

1997

# Judy Snell, Leroy Snell v. Salt Lake County, Utah County, Utah Department of Transportation, City of Draper, Utah, City of Lehi, Utah : Brief of Appellant

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 Utah Court of Appeals  
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**UTAH COURT OF APPEALS  
BRIEF**

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**UTAH COURT OF APPEALS**

DOCKET NO. 970201-CA

JUDY SNELL and LEROY SNELL,  
Guardians and Conservators of the  
Estate of Kenneth Read Snell,

Plaintiffs/Appellants,

vs.

SALT LAKE COUNTY, UTAH  
COUNTY, UTAH DEPARTMENT  
OF TRANSPORTATION, CITY  
OF DRAPER, UTAH, and CITY OF  
LEHI, UTAH,

Defendants/Appellees.

No. 970201  
No. 950906363

Priority No. 15

**BRIEF OF APPELLANTS JUDY SNELL AND LEROY SNELL,  
GUARDIANS AND CONSERVATORS OF THE ESTATE OF  
KENNETH READ SNELL**

APPEAL FROM ORDER GRANTING DEFENDANT DRAPER CITY'S MOTION  
FOR SUMMARY OF THE THIRD DISTRICT COURT IN AND FOR SALT LAKE  
COUNTY STATE OF UTAH; THE HONORABLE WILLIAM B. BOHLING PRESIDING

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## **PARTIES TO THE PROCEEDINGS IN THE DISTRICT COURT**

All the parties to the proceedings below are listed in the caption. However, the only parties participating in this appeal are the plaintiffs Judy Snell and LeRoy Snell, guardians and conservators of the estate of Kenneth Reed Snell and the defendant Draper City. The remaining defendants have been dismissed without prejudice from the proceedings.

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### **STATEMENT OF JURISDICTION**

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2(a)-3(3)(j) (1996).

### **ISSUE ON APPEAL**

Whether the trial court erred in ruling that Draper did not owe a duty to Snell to maintain traffic control devices in a safe condition conducive to the safe flow of traffic where the undisputed facts demonstrate that Draper had posted a 40 mile per hour speed limit sign on the west side of the Frontage Road to control southbound traffic but failed to post any speed limit signs or other traffic control devices on the east side of the road to similarly control northbound traffic, thereby creating an inherently dangerous and defective traffic control condition which Snell alleges was a proximate cause of the accident.

### **STANDARD OF REVIEW**

Because summary judgment only involves issues of law, this Court should review the trial court's conclusions for correctness. County Oaks Condominium Management v. Jones, 851 P.2d 640 (Utah 1993); St. Benedicts Development v. St. Benedicts Hospital, 811 P.2d 194, 196 (Utah 1991). Additionally, "[o]n an appeal from summary judgment, we consider only two questions: whether the lower court erred in (1) applying the governing law and (2) holding that no material facts were in dispute." Nelson by and through Stuckman v. Salt Lake City, 919 P.2d 568, 571 (Utah 1996) (citation omitted). "Furthermore, because negligence cases often require the drawing of inferences from the facts, which is properly

done by juries rather than judges summary judgment is appropriate in negligence case only in the clearest instances” Id. (quoting Dwiggins v. Morgan Jewelers, 811 P.2d 182, 183 (Utah 1991)).

### **DETERMINATIVE LAW**

Utah Governmental Immunity Act, Utah Code Annotated § 63-30-1, § 63-30-4(1)(b), 63-30-8 and 63-30-10 (1993). Referenced sections are included at Tab 1 of the Appendix.

### **STATEMENT OF THE CASE**

On October 13, 1993, Kenneth Reed Snell was seriously and permanently injured in an automobile and truck collision on a road under Draper City’s control. The collision occurred on the east Frontage Road that parallels Interstate 15, at Point of the Mountain, Utah. Draper City had posted a 40 mile per hour speed limit sign regulating the flow of southbound traffic on the frontage road but had failed to post any speed limit signs similarly regulating the flow of northbound traffic on said road. The trial court granted Draper City’s motion for summary judgment and ruled that Draper owed no duty to Kenneth Reed Snell to post similar traffic control devices for northbound traffic. This appeal is taken from the trial court’s Order Granting City of Draper’s Motion for Summary Judgment. Specifically, the trial court concluded that: (1) Draper had no duty to regulate northbound traffic notwithstanding that Draper had undertaken to regulate southbound traffic; and (2) that the

public duty doctrine barred Snell's claims. [Order Granting City of Draper's Motion for Summary Judgment (hereinafter "Order") at 3-5, a copy of which is attached hereto at Tab 2 of the Appendix.]

### **STATEMENT OF MATERIAL FACTS**

The trial court found the following facts to be undisputed and material to its determination of the duty issue.

1. Plaintiffs are the guardians and conservators of the estate of Kenneth Read Snell, who was seriously injured in an automobile collision in Draper, Utah, on October 13, 1993. [Order at 2.]

2. The collision occurred on the east frontage road that parallels Interstate 15, where it intersects with a private road leading to a sand and gravel facility. [Order at 2.]

3. Mr. Snell was returning from the Lehi Animal Shelter, where he had picked up a load of animals to return to the University of Utah, where he was employed. [Order at 2.]

4. Mr. Snell was traveling northbound on the frontage road when the University of Utah van he was driving collided with a southbound large truck used to haul sand and gravel owned by Cazier Excavation. Darrell Casey, the driver of the Cazier truck, was

proceeding southbound and turning left across the northbound lane onto the private dirt road which was owned and maintained by Geneva Rock. [Order at 2.]

5. Draper City was responsible for the maintenance of the frontage road in question but not of the private road which intersected with it. [Order at 2.]

6. The place of the accident was approximately one mile north of the south Draper City boundary. [Order at 2.]

7. Prior to the accident, Draper had posted a 40 mile per hour speed limit sign on the west side of the frontage road which regulated the speed of southbound traffic that governed the operation of the Cazier truck. Draper City had not placed any speed limit signs, or signs warning of the intersection on the east side of the frontage road regulating the operation of the Snell vehicle. [Order at 3.]

There is evidence that Kenneth Reed Snell will require 24-hour-per-day care and supervision for the balance of his natural life as a result of the injuries he suffered in this accident. There is also evidence that if Draper had regulated northbound traffic in a similar fashion to its regulation of the southbound traffic (40 miles per hour), and if Snell's vehicle had been traveling at 40 miles per hour, the accident would not have occurred, (R.12) that Plaintiff's Responses to Defendant City of Draper's First Set of Interrogatories, Response

to Interrogatory No. 27. In light of the trial court's ruling on the duty issue, it did not reach these facts.

### **SUMMARY OF ARGUMENT**

The trial court erred in holding that Draper did not owe Snell a duty of reasonable care because the undisputed facts demonstrate that Draper affirmatively undertook to control the flow of traffic on the east frontage road where the collision occurred. Plaintiffs allege that Draper was negligent in the manner it chose to control such traffic. Utah courts and the majority of other jurisdictions have long recognized that municipalities have a nondelegable duty to exercise reasonable care in their regulation and maintenance of streets within the municipalities' control.

Notwithstanding this well-established precedence, the trial court held that Draper owed Snell no duty because: (1) Draper's regulation of southbound traffic did not impose a duty on Draper to regulate northbound traffic in a similar fashion; and (2) the public duty doctrine barred Snell's claim. Order at 3-5. More specifically, the trial court held that Draper's duty was a duty to all and that a duty to all is a duty to none absent a showing of a special relationship, which individual relationship the court found to be lacking. Id.

The trial court misinterpreted and misapplied Utah precedent. Accordingly, Section I of this Argument explains why Draper owed Snell a duty once it undertook to control the



safe flow of traffic on the frontage road. It further explains how the public duty doctrine may be reconciled with the courts' pronouncements holding that municipalities owe a duty of reasonable care in their regulation and maintenance of streets under their control. Alternatively, Section II argues that the public duty doctrine should be abrogated in total or at least in dangerous road condition cases in light of legislative mandates.

## **ARGUMENT**

### **I.**

#### **Draper Owed Snell a Duty to Exercise Reasonable Care Because Draper Affirmatively Undertook to Regulate and Control the Flow of Traffic When It Installed a 40 Mile An Hour Speed Limit Sign Governing Southbound Traffic.**

Utah has developed well-established precedent holding that governmental entities have a nondelegable duty to exercise reasonable care in their regulation and maintenance of streets and roadways within their control. See, e.g., Keegan v. State, 896 P.2d 618 (Utah 1995); Braithwaite v. West Valley City Corp., 860 P.2d 336 (Utah 1993); Duncan v. Union Pacific R. Co., 842 P.2d 832 (Utah 1992); Trapp v. Salt Lake City Corp., 835 P.2d 161 (Utah 1992); Jerz v. Salt Lake County, 822 P.2d 770 (Utah 1991); Ingram v. Salt Lake City, 733 P.2d 126 (Utah 1987); Richards v. Leavitt, 716 P.2d 276 (Utah 1985); Bowen v. Riverton City, 656 P.2d 434 (Utah 1982); Bigelow v. Ingersoll, 618 P.2d 50 (Utah 1980); Murray v. Ogden City, 548 P.2d 896 (Utah 1976); Carroll v. State Road Comm'n, 496 P.2d 888; Stevens v. Salt Lake County, 478 P.2d 496 (Utah 1970); Velasquez v. Union Pacific R. Co.,

469 P.2d 5 (Utah 1970); Bramel v. State Road Comm’n, 465 P.2d 534 (Utah 1970); Nyman v. Cedar City, 361 P.2d 1114 (Utah 1961); Rollow v. Ogden City, 66 Utah 475, 243 P. 791 (1926); Pollari v. Salt Lake City, 176 P.2d 111 (Utah 1947); Berger v. Salt Lake City, 56 Utah 403, 191 P. 233 (1920); Shugren v. Salt Lake City, 48 Utah 320, 159 P. 530 (1916); Sweet v. Salt Lake City, 43 Utah 306, 134 P. 1167 (1913); Robinson v. Salt Lake City, 40 Utah 497, 121 P. 968 (1912); Bills v. Salt Lake City, 37 Utah 507, 109 P. 745 (1910); Morris v. Salt Lake City, 35 Utah 474, 101 P. 373 (1909); Jones v. Ogden City, 32 Utah 221, 89 P. 1006 (1907); Scott v. Provo City, 14 Utah 31, 45 P. 1005 (1895); De Villiers v. Utah County, 882 P.2d 1161 (Utah App. 1994); Jones v. Bountiful City Corp., 834 P.2d 556 (Utah App. 1992); Duncan v. Union Pacific R. Co., 790 P.2d 595 (Utah App. 1990)

For example, the Utah Supreme Court stated that a city has a nondelegable duty to maintain its traffic control devices in a condition conducive to the safe flow of traffic. Richards, 716 P.2d at 277-79. The court held that a claim against a city for negligent maintenance of a stop sign is subject to the notice of claim requirements in the Utah Governmental Immunity Act. Id. at 277-79. The court expressly adopted 18 Eugene McQuillin, *The Law of Municipal Corporations* § 53.42 (3d ed. 1984) (hereinafter “McQuillin”), as a valid statement of the city’s duty. Id. at 278-79. The court reasoned that “the rule is that once having elected to erect devices to guide, direct or illuminate traffic

where no duty exists to do so, a municipality then has a duty to maintain those devices in a condition conducive to the safe flow of traffic and will be liable for its negligence in failing to do so.” Id. at 278 (quoting 18 McQuillin § 53.42).

Further, in Bowen v. Riverton City, the court held that Riverton had a nondelegable duty to maintain its traffic control devices making summary judgment inappropriate where the city knew a stop sign was laying down for approximately eighteen minutes before an accident occurred at an intersection regulated by that stop sign. Bowen, 656 P.2d at 435-37.

The court stated Utah’s oft pronounced rule that:

The city has a nondelegable duty to exercise due care in maintaining streets within its corporate boundaries in a reasonably safe condition for travel and the city may be held liable for injuries proximately resulting from its failure to do so. In fulfilling this duty, it is necessary for cities to maintain traffic control signals in a reasonably safe, visible, and working condition. Whether the city fulfilled its duty to maintain the city streets in a safe condition in the instant case is a question of fact to be determined by the jury.

Id. at 437 (citations omitted).

The legislature has also implicitly recognized that governmental entities owe a duty of reasonable care in regulating and maintaining the safe flow of traffic. Specifically, Utah Code Ann. § 63-30-8 provides that “immunity from suit of all governmental entities is waived for any injury caused by the defective, unsafe, or dangerous condition of any

highway, road, [or] street.” (Of course this waiver of immunity is qualified by the exception for discretionary or policy acts; see Utah Code Ann. § 63-30-10.) Any waiver of immunity by the legislature would be rendered meaningless if governmental entities did not owe a duty in the first place. That governmental entities owe a duty of reasonable care in regulating and maintaining the safe flow of traffic seems obvious.

Indeed, as was recognized by this Court in Jones v. Bountiful City, “decisions in a majority of the states affirm implied liability to private action for injuries resulting from defective public ways.” Bountiful City, 834 P.2d at 560 (quoting 19 McQuillin § 54.02 (3d ed. 1985)). In Bountiful City, this Court held that Bountiful did not have a duty to install traffic control devices to regulate an unsigned intersection and that it did not have a duty to remove foliage on private property. Id. This Court reasoned that while a municipality is not generally affirmatively required to erect traffic control devices, “once the municipality takes action to install such devices, it must do so in a non-negligent manner.” Id. (citing 19 McQuillin § 54.28b (3d ed. 1985))(emphasis added). McQuillin explains that “though a city is not generally liable for failure to install signs or signals, if it undertakes to do so and invites public reliance on such signs or signals, it may be held liable for creating a dangerous condition, or nuisance.” 19 McQuillin § 54.28.10 (3d ed. 1994).

Notwithstanding this well-established precedent, the trial court held that Draper did not owe Snell a duty because any duty Draper had was a duty to the public at large and not to Snell as an individual. [Order at 4-5; (R. 19-20).] The court relied expressly on the public duty doctrine in holding that Snell's claims were barred. Order at 4-5. Unfortunately, the trial court misconstrued and misapplied the so-called public duty doctrine.

At the core of the public duty doctrine is the notion that the law will only impose affirmative duties to act when a special relationship exists and absent a special relationship there is no duty. See, e.g., Rollins v. Petersen, 813 P.2d 1156 (Utah 1991) (failure to control mental health patient); Ferree v. State, 784 P.2d 149 (Utah 1989); Beach v. University of Utah, 726 P.2d 413 (Utah 1986) (failure to control student); Pease v. Industrial Comm'n, 694 P.2d 613 (Utah 1984) (failure to arrest allegedly drunken motorist); Obray v. Malmberg, 484 P.2d 160 (Utah 1971) (failure to investigate burglary); Cannon v. University of Utah, 866 P.2d 586 (Utah App. 1993) (failure to affirmatively assist pedestrians); Lamarr v. Utah Dep't of Transp., 828 P.2d 535 (Utah App. 1992) (failure to construct additional walkways or control transients).

In Beach the court held that the University of Utah had no duty to control a student on a field trip who wandered off from camp unnoticed and apparently fell off a cliff while intoxicated. Beach, 726 P.2d at 414-17. The court reasoned that only in "unusual

circumstances” would the court impose an “affirmative duty to care for another.” Id. at 415.

Further, the court stated that:

The law imposes upon one party an affirmative duty to act only when certain special relationships exist between the parties. These relationships generally arise when one assumes responsibilities for another’s safety or deprives another of his or her normal opportunities for self-protection.

Id. (citing Restatement (Second) of Torts § 314(A) (1964)). The court found that no “special relationship” existed. Beach, 726 P.2d at 416-17.

Likewise, in Ferree the court held that the State had no duty to affirmatively prevent a previously nonviolent inmate from killing a private citizen while the inmate was released into the temporary custody of his mother to attend a wedding. Ferree, 784 P.2d at 150-52. The court reasoned that “[d]uty is ‘a question of whether the defendant is under any obligation for the benefit of a particular plaintiff.’” Id. at 151 (quoting Prosser & Keeton on the Law of Torts § 53 (W. Page Keeton, 5th ed. 1984)). The court contrasted this situation with situations where a governmental entity had assumed a specific duty of care or where the governmental entity had reason to appreciate that an inmate had demonstrated a capacity for violence. Ferree, 784 P.2d at 150-52. In finding that the State owed no duty of care, the court expressly reasoned that the State had no reason to know that the inmate was violent. Id.

Finally, in Rollins, the court held that Utah State Hospital had no affirmative duty to prevent an AWOL mental health patient from subsequently stealing a vehicle and colliding with a private citizen. Rollins, 813 P.2d at 1158-62. The court stated “[w]e acknowledge the general application in Utah of the ‘special relation’ analysis described in sections 314 through 320 of the Restatement of Torts.” Id. at 1159 (citing Restatement (Second) of Torts §§ 314-20 (1965)). The court, after reviewing its previous decisions, employed a “pragmatic approach.” Id. at 1160-62. The court reasoned that “[d]etermining whether one party has an affirmative duty to protect another ... requires a careful consideration of the consequences for the parties and society at large.” Id. at 1160 (quoting Beach, 726 P.2d at 418). Ultimately, the court concluded that the plaintiff had failed to establish a special relationship distinguishable to the hospital that would justify imposing on the hospital an affirmative duty to protect the plaintiff. Rollins, 813 P.2d at 1162.

Here, the trial court erred in using the public duty doctrine as a shield to Draper’s negligent regulation of traffic on the frontage road where Draper affirmatively acted in erecting a speed limit sign for only one direction of traffic on the same road. The public duty doctrine governs situations where the question is whether or not to impose an affirmative duty to act (or protect) for the benefit of a particular plaintiff. It does not govern situations where the governmental entity has affirmatively undertaken the duty.

To be certain, there is language in the various court pronouncements on the public duty doctrine that would lend credence to Justice Durham's comment that "a duty to all is a duty to none." Rollins, 813 P.2d at 1165 (Durham, J. concurring in part and dissenting in part; arguing for the abrogation of the public duty doctrine). But any such characterization of the public duty doctrine fails to appreciate the context in which these statements were made and, that at its core, the tort principle in question is whether to impose an affirmative duty to act. As has been acknowledged by legal commentators, there is a fundamental distinction between misfeasance and nonfeasance.

For example, in W. Page Keeton, et al., *Prosser and Keaton on the Law of Torts* § 56 (5th ed. 1984), the authors explain:

Liability for nonfeasance was therefore slow to receive recognition in the law. It first appears in the case of those engaged in 'public' callings, who, by holding themselves out to the public, were regarded as having undertaken a duty to give service, for the breach of which they were liable. With the development of the action of assumpsit, this principle was extended to anyone who, for a consideration, has undertaken to perform a promise—or what we now call a contract. During the last century, liability for 'nonfeasance' has been extended still further to a limited group of relations, in which custom, public sentiment and views of social policy have led the courts to find a duty of affirmative action. In such relationships the plaintiff is typically in some respect particularly vulnerable and dependent upon the defendant who, correspondingly, holds considerable power over the plaintiff's welfare... Liability for 'misfeasance,' then, may extend to any person to whom harm



may reasonably be anticipated as a result of the defendant's conduct, or perhaps even beyond; while for 'nonfeasance' it is necessary to find some definite relation between the parties, of such character that social policy justifies the imposition of a duty to act.

(Emphasis added.)

Further, the commentators of the Restatement (Second) of Torts, in explaining why the general rule is that a person does not have an affirmative duty to act even when that person's action is necessary for another's aid, state:

a. The general rule stated in this Section should be read together with the other sections which follow. Special relations may exist between the actor and the other, as stated in § 314A, which impose upon the actor the duty to take affirmative precautions for the aid or protection of the other. The actor may have control of a third person, or of land or chattels, and be under a duty to exercise such control, as stated in §§ 316-20. The actor's prior conduct, whether tortious or innocent, may have created a situation of peril to the other, as result of which the actor is under a duty to act to prevent the harm, as stated in §§ 321 and 322. The actor may have committed himself to the performance of an undertaking, gratuitously or under contract, and so may have assumed a duty of reasonable care for the protection of the other, or even a third person, as stated in §§ 323, 324, 324A.

...

c. ... The origin of the rule lay in the early common law distinction between action and inaction, or 'misfeasance' and 'nonfeasance.' In the early law one who injured another by a positive affirmative act was held liable without any great regard

even for his fault.... Hence liability for nonfeasance was slow to receive any recognition in the law. It appeared first in, and is still largely confined to, situations in which there was some special relation between the parties, on the basis of which the defendant was found to have a duty to take action for the aid or protection of the plaintiff.

Restatement (Second) of Torts § 314 (1965).

Thus, once Draper undertook to regulate the flow of traffic on the frontage road, the analysis of its duty shifted from nonfeasance to misfeasance. The misfeasance analysis is set forth in Section 323 of the Restatement (Second) of Torts. Under that section, once an entity undertakes to perform a service, that entity has a duty to do so in a nonnegligent fashion. This analysis is implicit in all of the Utah decisions dealing with the defective or unsafe condition in roads and ways. If not, the public duty doctrine would bar all road defect cases because governmental entities do not construct, regulate, or maintain roads and ways for individuals, they do it for the public at large and it would be a fiction to pretend otherwise. Notwithstanding the fact that the frontage road was regulated by Draper for the public at large, Draper, once having chosen to so regulate the flow of traffic, owed a duty to regulate traffic “in a condition conducive to the safe flow of traffic and will be liable for its negligence in failing to do so.” Richards, 716 P.2d at 278 (quoting 18 McQuillin § 53.42); see also, Bountiful City, 834 P.2d at 559-60.

This method of analysis found explicit acceptance in the recent Utah Supreme Court case of Nelson by and through Stuckman v. Salt Lake City, 919 P.2d 568, 572-76 (Utah 1996). In Nelson, the court held that the city (or alternatively, the state) owed a duty of reasonable care to protect the plaintiff from the dangers of the Jordan River once it (the city) decided to erect a fence between a park and the river. Id. The court expressly rejected application of the public duty doctrine because the city had undertaken to provide protection. Id. The court reasoned:

The common law recognizes a duty of due care on the part of an individual or entity that undertakes, whether gratuitously or for consideration, to perform a duty. Breach of that duty may result in an actionable tort. The Restatement of Torts describes this duty as follows:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking.

Id. at 573 (quoting Restatement (Second) of Torts § 323 (1977)). The court also reasoned that “[w]here one undertakes an act which he has no duty to perform and another reasonably

relies upon the undertaking, the act must generally be performed with ordinary or reasonable care.” Nelson, 919 P.2d at 573 (quoting Am. Jur. 2d Negligence § 208 (1989) and citing DCR Inc. v. Peak Alarm Co., 663 P.2d 433, 436 (Utah 1983)); see also Weber, by and through Weber v. Springville, 725 P.2d 1360, 1364 (Utah 1986).

Thus the court concluded that “once an entity undertakes to provide the protection, it is obligated to use reasonable care in providing it.” Nelson, 919 P.2d at 573. Since the city had erected a fence, the court found it had assumed the duty to protect the plaintiff in a nonnegligent fashion. Id. at 572-74. (The court also found that discretionary immunity did not protect the municipality’s negligent performance of its duty. Id. at 574-76.)

Similarly, Draper owed Snell a duty to regulate the safe flow of traffic on the frontage road consistently from both directions of travel once it undertook to regulate southbound traffic with a 40 mile per hour speed limit sign. Draper argued, and the trial court accepted, that Draper’s regulation of the flow of southbound traffic did not impose a duty upon Draper to regulate northbound traffic. (R. 4-20); Order at 4. This conclusion is erroneous for several reasons.

First, as discussed above, it ignores Utah precedent which imposes a duty to regulate traffic in a condition conducive to the safe flow of traffic, and that breach of that duty will result in liability; particularly where the regulation contributes to or creates a hazardous

traffic condition. That Draper undertook this duty should be obvious given that it chose to regulate southbound traffic.

Second, that conclusion requires the absurd assumption that the southbound lane of traffic exists independent and isolated from the northbound traffic. Surely the “safe flow of traffic” encompasses both sides of a two lane highway. Indeed, this is particularly true where, as here, motorists may lawfully cross the other lane of traffic in entering or exiting the highway or in passing other vehicles headed the same direction. This is even more true where the plain implication of Draper having posted a 40 mile per hour speed limit sign for southbound traffic is that Draper was aware of the dangerous conditions on the frontage road created by large trucks traveling upon, entering and exiting the frontage road.

Third and finally, this conclusion ignores the fact that Draper’s regulation of the frontage road created an inherently defective, unsafe and dangerous condition. Draper’s affirmative act, by unevenly regulating traffic, created conflicting assumptions for drivers about the flow of traffic from the opposite direction. As a consequence of Draper’s act, southbound traffic was regulated by the 40 mile per hour speed limit sign, while northbound traffic was regulated by Utah’s default speed limit of 55 miles per hour. See Utah Code Ann. § 41-6-46(2)(d) (1993). Taking Draper’s (and the trial court’s) conclusion to its logical end, Draper would not have a duty if it had posted 20 mile per hour speed limit signs and signs

warning of slow-moving, entering and exiting traffic so long as Draper had only posted these signs on the west side of the road governing only southbound traffic, while northbound traffic is traveling at 55 miles per hour. Under this reasoning, Draper would be found to have no duty where it posted a school crossing warning and 20 miles per hour speed limit for one direction of traffic and did nothing to regulate or warn traffic traveling in the opposite direction. The trial court's reasoning would lead to this and many other illogical results.

Clearly, Draper owed Snell a duty to regulate the frontage road in a consistent condition conducive to the safe flow of traffic because it undertook to regulate the flow of traffic when it erected the 40 mile per hour speed limit sign for southbound traffic. Whether or not Draper breached this duty should appropriately be considered by the trier of fact. Accordingly, Snell respectfully requests that this Court reverse the trial court's determination and hold that Draper owed Snell a duty of reasonable care in its regulation of traffic flow on the frontage road at Point of the Mountain, Draper, Utah.

**II.**  
**Alternatively, this Court Should Abrogate the Public  
Duty Doctrine or Should Hold that a Governmental Entity's  
Duties related to Street Regulation, Construction and Maintenance  
are Exceptions to the Public Duty Doctrine.**

Should this Court determine that the public duty doctrine bars Snell's claim against Draper because a duty to all is a duty to none, this Court should abrogate the public duty doctrine or, at a minimum, hold that Draper's duties related to street regulation, construction and maintenance are exceptions to the public duty doctrine. There are several well-founded reasons why the public duty doctrine should not bar claims against governmental entities in street and road cases.

First, and foremost, application of a judicially-created doctrine (whose origins are in nonfeasance situations) is inappropriate where the legislature has affirmatively waived immunity. The Utah Legislature has affirmatively and specifically provided that "immunity from suit of all governmental entities is waived for any injury caused by the defective, unsafe, or dangerous condition of any highway, road, [or] street." Utah Code Ann. § 63-30-8 (emphasis added) (of course this waiver of immunity is qualified by the exception for discretionary or policy acts; see Utah Code Ann. § 63-30-10). The legislature has further explained that "[i]f immunity from suit is waived by this chapter, consent to be sued is granted, and liability of the entity shall be determined as if the entity were a private person."

Utah Code Ann. § 63-30-4(1)(b) (emphasis added). By this enactment, the legislature has foreclosed treating and analyzing the liability of public entities any differently from private persons. (It also produces uneven and unjust results by making an arbitrary distinction between possible defendants.) Hence, any rationale by the courts that the public duty doctrine is justified by policy considerations specific to public entities is inappropriate and meritless.

Indeed as was stated in Bastian v. King, 661 P.2d 953, 956 (Utah 1983) (citations omitted),

It is the power and responsibility of the Legislature to enact laws to promote the public health, safety, morals and general welfare of society and this Court will not substitute our judgment for that of the Legislature with respect to what best serves the public interest.

Since the legislative power is vested in the Utah Legislature (see Utah Constitution Art. VI, § 1) and the legislature has spoken on the matter, any contradictory result by the courts raises separation of powers concerns under Utah Constitution Art. V, § 1. State courts cannot, under the pretense of an actual case, assume powers vested in the legislature or undermine its pronouncements. Conrad v. City & County of Denver, 656 P.2d 662 (Colo. 1982); People in Interest of L.R.S., 791 P.2d 1215 (Colo. App. 1990).



Besides, to the extent that public duty doctrine is justified by concerns over whether public entities will be exposed too broadly to liability and that this exposure will hamper the effectiveness of public entities (see, e.g., Ferree, 784 P.2d at 151; Cannon, 866 P.2d at 589), these concerns are still safeguarded by traditional tort notions of foreseeability, breach of duty, actual cause and proximate cause, and damages. See generally, Rollins, 813 P.2d at 1164-68 (Durham, J., concurring in part and dissenting in part; arguing for the abrogation of the public duty doctrine). Perhaps more importantly, the legislature has retained immunity in many instances; and even where the legislature has waived immunity, that waiver is subject to significant exceptions, such as immunity for discretionary or policy acts.

While it is true that a number of decisions have made the analytical distinction between the affirmative defense of governmental immunity and whether a duty exists in the first place, the practical effect of such discussions offers a distinction without a difference. See, e.g., Ferree, 784 P.2d at 151-53; Lamarr, 828 P.2d at 539-40. This approach is intellectually disingenuous because, regardless of theoretical distinctions and methods of analysis, the end result is always the same. If the court always analyzes whether a duty exists under the public duty doctrine prior to considering whether the legislature has waived immunity, the result will be to always find there is no duty in the first place. Unfortunately,

this approach renders the legislatures' waiver of sovereign immunity for dangerous road conditions meaningless.

Finally, based upon the above-discussed reasons, there is a growing and significant trend to abrogate the public duty doctrine; including a majority of Utah's neighboring jurisdictions. Rollins, 813 P.2d at 1164-68 (Durham, J., concurring in part and dissenting in part; arguing for the abrogation of the public duty doctrine and noting the modern trend towards the same); see, e.g., Busby v. Municipality of Anchorage, 741 P.2d 230 (Alaska 1987); Adams v. State, 555 P.2d 235, 241-42 (Alaska 1976); Ryan v. State, 656 P.2d 597, 598-99 (Ariz. 1982); Leake v. Cain, 720 P.2d 152, 158 (Colo. 1986); Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010, 1016 (Fla. 1979); Wilson v. Nepstad, 282 N.W.2d 664 (Iowa 1979); Stewart v. Schmieder, 386 So.2d 1351 (La. 1980); Jean W. v. Commonwealth, 610 N.E.2d 305 (Mass. 1993); Doucette v. Town of Bristol, 635 A.2d 1387 (N.H. 1993); Schear v. Board of Bernalillo County Comm'rs, 687 P.2d 728 (N.M. 1984); Brennen v. City of Eugene, 591 P.2d 719, 725 (Or. 1979); Catone v. Medberry, 555 A.2d 328 (R.I. 1989); Hudson v. Town of East Montpelier, 638 A.2d 561 (Ver. 1993); Coffey v. Milwaukee, 247 N.W.2d 132, 139 (Wis. 1976).

As noted by McQuillin:

The public duty rule has been abrogated in a number of jurisdictions. The states have rejected the public duty rule

because the rule is, in effect if not in theory, a continuation of the abolished governmental immunity doctrine. The rule also creates confusion in the law and produces uneven and inequitable results in practice. Courts abrogating the rule reject the contention that the public duty rule is the only principle protecting municipalities from massive liabilities; these courts maintain that ordinary tort rules, such as the rule requiring foreseeability of harm, will adequately limit the scope of municipal liability. These courts also remind us that abrogation of the doctrine of municipal governmental immunity merely removes the defense of immunity and does not create any new liability for a municipality.

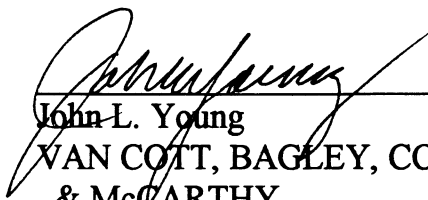
18 McQuillin § 53.04.25 (3d ed. 1993). McQuillin has also reasoned that once a municipality affirmatively acts (e.g. by erecting traffic control devices) that it has “assumed that duty” and “a special duty or special relationship comes into existence.” 18 McQuillin § 53.04.30 (3d ed. 1993).

Simply stated, the application of the public duty doctrine in dangerous road condition cases makes no sense in light of legislative mandates. Accordingly, should this Court find that the public duty doctrine is a bar to Snells’ claims, this Court should abrogate the public duty doctrine or at least find that dangerous road condition cases are exceptions to its application. Therefore, Snell respectfully requests that this Court abrogate the public duty doctrine in toto or at least as it applies to dangerous road condition cases.

## **CONCLUSION**

The lower court erred in granting Draper's Motion for Summary Judgment. Although Draper may not have had an affirmative duty to erect any traffic regulatory signs or devices on the frontage road initially, the law is clear that once Draper affirmatively acted by erecting a 40-mile per hour speed limit for the regulation of southbound traffic, the duty was imposed upon Draper to install such traffic regulatory devices in a non-negligent manner. Plaintiffs allege that the failure by Draper to provide consistent traffic regulation for motor vehicle traffic on the same two-lane road, at the same area, traveling in opposite directions constituted negligence on the part of Draper City. The failure of Draper City to provide consistent regulatory devices for both directions of traffic created a hazardous and defective condition on the frontage road. This failure, plaintiffs allege, was a proximate cause of the accident for which the plaintiffs are entitled to their day in court. The lower court's order granting summary judgment for the defendant should be reversed and the matter remanded for trial.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of June, 1997.

  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that 2 true and correct copies of the foregoing instrument were mailed, first-class, postage prepaid, on this 11<sup>th</sup> day of June, 1997, to the following:

Dennis C. Ferguson  
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# **APPENDIX**

Tab 1



Section		Section	
	against governmental entity or employee — Insurance coverage exception.		ployee — Request — Cooperation — Payment of judgment.
63-30-35.	Expenses of attorney general, general counsel for state judiciary, and general counsel for the Legislature in representing the state, its branches, members, or employees.	63-30-37.	Recovery of judgment paid and defense costs by government employee.
63-30-36.	Defending government em-	63-30-38.	Indemnification of governmental entity by employee not required.

### 63-30-1. Short title.

This act shall be known and may be cited as the "Utah Governmental Immunity Act."

**History:** L. 1965, ch. 139, § 1.

**Meaning of "this act."** — The term "this act," as used in this section, means Laws 1965, ch. 139, §§ 1 to 37, which enacted §§ 63-30-1 to 63-30-10, 63-30-11 to 63-30-28, and 63-30-31 to 63-30-33.

**Cross-References.** — Comparative negligence, §§ 78-27-37, 78-27-38.

Insect infestation emergency control activities, immunity, § 4-35-8.

Limitation of actions on claims against cities, § 78-12-30.

Mailing claims to state or political subdivisions, § 63-37-1 et seq.

Voluntary services for public entities, immunity from liability, §§ 63-30b-1 to 63-30b-4.

### NOTES TO DECISIONS

#### ANALYSIS

Application of act.  
Equitable claims.

#### Application of act.

Governmental Immunity Act applies only to entities and does not include the entities' employees. *Cornwall v. Larsen*, 571 P.2d 925 (Utah 1977).

This act applies only to governmental entities and does not affect the personal liability of individuals for their own torts. *Madsen v. State*, 583 P.2d 92 (Utah 1978).

Judicial review of a decision of the Division of State Lands to cancel a lease was authorized by former § 65-1-9 and did not require compliance with the Governmental Immunity Act.

*Adkins v. Division of State Lands*, 719 P.2d 524 (Utah 1986).

#### Equitable claims.

The Governmental Immunity Act did not abolish the common-law exception of equitable claims from governmental immunity: claims for overcharges on water and sewer service and for discrimination in failing to provide usual city services were equitable in nature, and governmental immunity and lack of notice were not available as defenses. *El Rancho Enters., Inc., v. Murray City Corp.*, 565 P.2d 778 (Utah 1977).

Governmental immunity is not a defense to equitable claims. *Bowles v. State ex rel. Department of Transp.*, 652 P.2d 1345 (Utah 1982).

### COLLATERAL REFERENCES

**Utah Law Review.** — The Utah Governmental Immunity Act: An Analysis, 1967 Utah L. Rev. 120.

Misapplication of Governmental Immunity — *Epting v. Utah*, 1976 Utah L. Rev. 186.

A New Perspective — Has Utah Entered the Twentieth Century in Tort Law?, 1981 Utah L. Rev. 495.

Recent Developments in Utah Law — Judicial Decisions — Torts, 1987 Utah L. Rev. 244.

Recent Developments in Utah Law — Judi-

cial Decisions — Constitutional Law, 1990 Utah L. Rev. 129.

**Journal of Energy, Natural Resources and Environmental Law.** — Government Liability for Seismic Hazards in Utah, 11 J. Energy, Nat. Resources & Envtl. L. 69 (1990).

**Am. Jur. 2d.** — 56 Am. Jur. 2d Municipal Corporations, Counties and Other Political Subdivisions § 680 et seq.; 57 Am. Jur. 2d Municipal, School, and State Tort Liability § 1 et seq.; 68 Am. Jur. 2d Schools §§ 5, 17; 72 Am.

Jur. 2d States, Territories, and Dependencies §§ 99 to 128.

**C.J.S.** — 20 C.J.S. Counties §§ 180 et seq., 239 et seq.; 63 C.J.S. Municipal Corporations § 745 et seq.; 64 C.J.S. Municipal Corporations §§ 2173 to 2214; 78 C.J.S. Schools and School Districts §§ 100, 153, 238, 318 to 322; 79 C.J.S. Schools and School Districts §§ 423 to 444; 81A C.J.S. States §§ 196 to 202, 267 et seq.

**A.L.R.** — Right of contractor with federal, state, or local public body to latter's immunity from tort liability, 9 A.L.R.3d 382.

Modern status of doctrine of sovereign immunity as applied to public schools and institutions of higher learning, 33 A.L.R.3d 703.

Immunity of private schools and institutions of higher learning from liability in tort, 38 A.L.R.3d 480.

Sovereign immunity doctrine as precluding suit against sister state for tort committed within forum state, 81 A.L.R.3d 1239.

Official immunity of state national guard members, 52 A.L.R.4th 1095.

Liability to one struck by golf ball, 53 A.L.R.4th 282.

Liability of school authorities for hiring or

retaining incompetent or otherwise unsuitable teacher, 60 A.L.R.4th 260.

Tort liability of United States under Claims Act for acts committed by aliens, 78 A.L.R. Fed. 683.

Calculations of attorneys' fees under Federal Tort Claims Act — 28 USCS § 2678, 86 A.L.R. Fed. 866.

Construction and application of Federal Tort Claims Act provision excepting from coverage claims arising out of interference with contract rights (28 USCS § 2680(h)), 92 A.L.R. Fed. 186.

Application of collateral source rule in actions under Federal Tort Claims Act (28 USCS § 2674), 104 A.L.R. Fed. 492.

Appealability, under collateral order doctrine, of order denying qualified immunity in 42 USCS § 1983 or *Bivens* action for damages where claim for equitable relief is also pending — post-*Harlow* cases, 105 A.L.R. Fed. 851.

**Key Numbers.** — Counties ⇨ 141 to 148, 197 to 228; Municipal Corporations ⇨ 723 et seq., 1001 to 1040; Schools ⇨ 89 et seq., 112 et seq.; States ⇨ 112, 169 et seq., 191.

## 63-30-2. Definitions.

As used in this chapter:

(1) "Claim" means any claim or cause of action for money or damages against a governmental entity or against an employee.

(2) (a) "Employee" includes a governmental entity's officers, employees, servants, trustees, commissioners, members of a governing body, members of a board, members of a commission, or members of an advisory body, officers and employees in accordance with Section 62A-4-603, student teachers certificated in accordance with Section 53A-6-101, educational aides, students engaged in providing services to members of the public in the course of an approved medical, nursing, or other professional health care clinical training program, volunteers, and tutors, but does not include an independent contractor.

(b) "Employee" includes all of the positions identified in Subsection (2)(a), whether or not the individual holding that position receives compensation.

(3) "Governmental entity" means the state and its political subdivisions as defined in this chapter.

(4) (a) "Governmental function" means any act, failure to act, operation, function, or undertaking of a governmental entity whether or not the act, failure to act, operation, function, or undertaking is characterized as governmental, proprietary, a core governmental function, unique to government, undertaken in a dual capacity, essential to or not essential to a government or governmental function, or could be performed by private enterprise or private persons.

(b) A "governmental function" may be performed by any department, agency, employee, agent, or officer of a governmental entity.

## COLLATERAL REFERENCES

**Utah Law Review.** — Recent Development in Utah Law — Judicial Decisions — Constitutional Law, 1990 Utah L. Rev. 129.

**Journal of Contemporary Law.** — Defining Governmental Function Under the Utah Governmental Immunity Act, 9 J. Contemp. L. 193 (1983).

**Journal of Energy Law and Policy.** — Comment, The Only Way to Manage a Desert: Utah's Liability Immunity for Flood Control, 8 J. Energy L. & Pol'y 95 (1987).

**A.L.R.** — Liability of municipality for personal injury or death under mob violence or anti-lynching statutes, 26 A.L.R.3d 1142.

Liability of municipality for property damage under mob violence statutes, 26 A.L.R.3d 1198.

Modern status of rule excusing governmental unit from tort liability on theory that only general, not particular, duty was owed under circumstances, 38 A.L.R.4th 1194.

Governmental tort liability for failure to provide police protection to specifically threatened crime victim, 46 A.L.R.4th 948.

Failure to restrain drunk driver as ground of liability of state or local governmental unit or officer, 48 A.L.R.4th 287.

Governmental liability for failure to post highway deer crossing warning signs, 59 A.L.R.4th 1217.

State's liability for personal injuries from criminal attack in state park, 59 A.L.R.4th 1236.

Tort liability of public authority for failure to remove parentally abused or neglected children from parents' custody, 60 A.L.R.4th 942.

Tort liability of college or university for injury suffered by student as a result of own or fellow student's intoxication, 62 A.L.R.4th 81.

Hospital's liability for injury allegedly caused by failure to have properly qualified staff, 62 A.L.R.4th 692.

Liability to one struck by golf club, 63 A.L.R.4th 221.

Tort liability of college, university, fraternity, or sorority for injury or death of member or prospective member by hazing or initiation activity, 68 A.L.R.4th 228.

Governmental liability for negligence in licensing, regulating, or supervising private day-care home in which child is injured, 68 A.L.R.4th 266.

Right of one governmental subdivision to sue another such subdivision for damages, 11 A.L.R.5th 630.

Construction and application of Federal Tort Claims Act provision excepting from coverage claims arising out of assault and battery (28 USCS § 2680(h)), 88 A.L.R. Fed. 7.

**63-30-4. Act provisions not construed as admission or denial of liability — Effect of waiver of immunity — Exclusive remedy — Joinder of employee — Limitations on personal liability.**

(1) (a) Nothing contained in this chapter, unless specifically provided, may be construed as an admission or denial of liability or responsibility by or for governmental entities or their employees.

(b) If immunity from suit is waived by this chapter, consent to be sued is granted, and liability of the entity shall be determined as if the entity were a private person.

(c) No cause of action or basis of liability is created by any waiver of immunity in this chapter, nor may any provision of this chapter be construed as imposing strict liability or absolute liability.

(2) Nothing in this chapter may be construed as adversely affecting any immunity from suit that a governmental entity or employee may otherwise assert under state or federal law.

(3) (a) Except as provided in Subsection (b), an action under this chapter against a governmental entity or its employee for an injury caused by an act or omission that occurs during the performance of the employee's duties, within the scope of employment, or under color of authority is a plaintiff's exclusive remedy.

(b) A plaintiff may not bring or pursue any other civil action or proceeding based upon the same subject matter against the employee or the

### 63-30-5. Waiver of immunity as to contractual obligations.

#### NOTES TO DECISIONS

##### ANALYSIS

Applicability.  
Implied covenants.  
Cited.

##### Applicability.

This section does not waive the notice requirements for a suit against a state employee for acts or omissions occurring during the performance of his duties, notwithstanding a nexus between the claim asserted and "any contractual obligation." Nielson v. Gurley, 888

P.2d 130 (Utah Ct. App. 1994), cert. denied, 899 P.2d 1231 (Utah 1995).

##### Implied covenants.

By its waiver of immunity "as to any contractual obligation," the state is liable for its breaches of the covenant of good faith and fair dealing implicit in its contracts. Brown v. Weis, 871 P.2d 552 (Utah Ct. App. 1994).

Cited in Broadbent v. Board of Educ., 283 Utah Adv. Rep. 21 (Utah Ct. App. 1996).

### 63-30-8. Waiver of immunity for injury caused by defective, unsafe, or dangerous condition of highways, bridges, or other structures.

#### NOTES TO DECISIONS

##### ANALYSIS

Applicability.  
Discretionary function.  
Governmental control.  
School bus route.

##### Applicability.

The 1991 amendment, providing that the waiver provisions of this section are subject to the discretionary function exception of § 60-30-10, does not apply retroactively. Keegan v. State, 259 Utah Adv. Rep. 13 (Utah 1995).

##### Discretionary function.

The Department of Transportation's decision not to raise a concrete barrier during highway surface overlay projects was not an operational decision involving the negligent installation or

maintenance of a traffic device, but involved a policy-based plan and the exercise of judgment and discretion; thus, the decision was a discretionary act shielded from liability. Keegan v. State, 259 Utah Adv. Rep. 13 (Utah 1995).

##### Governmental control.

A governmental entity is affected by the waiver of immunity under this section only if it has control over the roads or highways upon which the dangerous condition exists. De Villiers v. Utah County, 882 P.2d 1161 (Utah Ct. App. 1994).

##### School bus route.

Legislature did not intend to include the function of designing school bus routes within waiver of this section. Smith v. Weber County Sch. Dist., 877 P.2d 1276 (Utah Ct. App. 1994).

### 63-30-9. Waiver of immunity for injury from dangerous or defective public building, structure, or other public improvement — Exception.

#### NOTES TO DECISIONS

##### ANALYSIS

Applicability.  
Public park.

##### Applicability.

Before the 1991 amendments to the Utah Governmental Immunity Act, the discretionary function and assault and battery exceptions in § 63-30-10 did not apply to the waiver of im-

munity in this section for defective or dangerous conditions in government buildings. The amendments were not retroactive. Taylor ex rel. Taylor v. Ogden City Sch. Dist., 881 P.2d 907 (Utah Ct. App. 1994), rev'd on other grounds, 902 P.2d 1234 (Utah 1995).

##### Public park.

Since the Governmental Immunity Act spe-

cifically addresses public improvements, it is the law most specific to a public park. De Baritault ex rel. De Baritault v. Salt Lake City Corp., 286 Utah Adv. Rep. 10 (Utah 1996).

### **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 employment except if the injury arises out of, in connection with, or results from:

- (1) the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused;
- (2) assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, or violation of civil rights;
- (3) the issuance, denial, suspension, or revocation of or by the failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, approval, order, or similar authorization;
- (4) a failure to make an inspection or by making an inadequate or negligent inspection;
- (5) the institution or prosecution of any judicial or administrative proceeding, even if malicious or without probable cause;
- (6) a misrepresentation by an employee whether or not it is negligent or intentional;
- (7) riots, unlawful assemblies, public demonstrations, mob violence, and civil disturbances;
- (8) the collection of and assessment of taxes;
- (9) the activities of the Utah National Guard;
- (10) the incarceration of any person in any state prison, county or city jail, or other place of legal confinement;
- (11) any natural condition on publicly owned or controlled lands, any condition existing in connection with an abandoned mine or mining operation, or any activity authorized by the School and Institutional Trust Lands Administration or the Division of Forestry, Fire and State Lands;
- (12) research or implementation of cloud management or seeding for the clearing of fog;
- (13) the management of flood waters, earthquakes, or natural disasters;
- (14) the construction, repair, or operation of flood or storm systems;
- (15) the operation of an emergency vehicle, while being driven in accordance with the requirements of Section 41-6-14;
- (16) a latent dangerous or latent defective condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located on them;
- (17) a latent dangerous or latent defective condition of any public building, structure, dam, reservoir, or other public improvement;
- (18) the activities of:
  - (a) providing emergency medical assistance;
  - (b) fighting fire;
  - (c) regulating, mitigating, or handling hazardous materials or hazardous wastes;
  - (d) emergency evacuations; or
  - (e) intervening during dam emergencies; or

(19) the exercise or performance or the failure to exercise or perform any function pursuant to Title 73, Chapter 5a or Title 73, Chapter 10 which immunity is in addition to all other immunities granted by law.

**History:** L. 1965, ch. 139, § 10; 1975, ch. 194, § 11; 1982, ch. 10, § 1; 1985, ch. 169, § 1; 1989, ch. 185, § 1; 1989, ch. 187, § 3; 1989, ch. 268, § 29; 1990, ch. 15, §§ 1, 2; 1990, ch. 319, §§ 1, 2; 1991, ch. 76, § 4; 1995, ch. 299, § 35; 1996, ch. 159, § 6; 1996, ch. 264, § 1.

**Amendment Notes.** — The 1995 amendment, effective May 1, 1995, substituted "School and Institutional Trust Lands Administration or the Division of Sovereign Lands and Forestry" for "Board of State Lands and Forestry" in Subsection (11).

The 1996 amendment by ch. 159, effective July 1, 1996, added "in connection with, or

results from" to the end of the introductory paragraph; deleted "or results from" from the beginning of Subsection (7); deleted "or in connection with" from the beginning of Subsection (8); and substituted "Division of Forestry, Fire and State Lands" for "Division of Sovereign Lands and Forestry" in Subsection (11).

The 1996 amendment by ch. 264, effective July 1, 1996, added Subsection (19), making a related stylistic change.

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

## NOTES TO DECISIONS

### ANALYSIS

Constitutionality.  
Applicability.  
Approval of plat.  
Assault and battery.  
Discretionary function.  
Sovereign immunity.  
Cited.

### Constitutionality.

The University of Utah performs a governmental function under the test developed in *Standiford v. Salt Lake City Corp.*, 605 P.2d 1230 (1980); thus, the immunity act is not unconstitutional as applied to a person who was injured when assaulted and struck by an employee of the University. *Wright v. University of Utah*, 876 P.2d 380 (Utah Ct. App.), cert. denied, 883 P.2d 1359 (Utah 1994).

### Applicability.

Before the 1991 amendments to the Utah Governmental Immunity Act, the discretionary function and assault and battery exceptions in this section did not apply to the waiver of immunity for defective or dangerous conditions in government buildings in § 63-30-9. The amendments were not retroactive. *Taylor ex rel. Taylor v. Ogden City Sch. Dist.*, 881 P.2d 907 (Utah Ct. App. 1994), rev'd on other grounds, 902 P.2d 1234 (Utah 1995).

The 1991 amendment of § 60-30-8, providing that the waiver provisions thereof are subject to the discretionary function exception of this section, does not apply retroactively. *Keegan v. State*, 259 Utah Adv. Rep. 13 (Utah 1995).

### Approval of plat.

A city's approval of a subdivision plat was clearly excepted by this section from any waiver of immunity, and plaintiff's claim characterizing the city's conduct as designing an intersection was effectively barred. *De Villiers*

*v. Utah County*, 882 P.2d 1161 (Utah Ct. App. 1994).

### Assault and battery.

The State, a school district, the State School for the Deaf and Blind, and the State Board of Education were exempt under Subsection (6) for injuries resulting to plaintiff, a deaf child, who was sexually molested and assaulted by a cab driver in taxi hired by the defendants to transport handicapped children to school. *S.H. ex rel. R.H. v. State*, 865 P.2d 1363 (Utah 1993).

Notwithstanding allegations that negligent implementation of a prerelease program led to plaintiff's injuries by assault and battery at the hands of a prerelease inmate, state defendants were immune from suit under the assault and battery exception in Subsection (2). *Malcolm v. State*, 878 P.2d 1144 (Utah 1994).

Plaintiff's complaint based on injuries received when she was assaulted and struck by an employee of the University of Utah and asserting that the injuries arose from the University's negligent hiring and supervision of the employee rather than from a battery was properly dismissed for failure to state a claim. This section focuses on the conduct or situation out of which the injury arose, not on the theory of liability crafted by the plaintiff or the type of negligence alleged. *Wright v. University of Utah*, 876 P.2d 380 (Utah Ct. App.), cert. denied, 883 P.2d 1359 (Utah 1994).

An amendment to a complaint based on injuries received when plaintiff was assaulted and struck by an employee of the University of Utah alleging that, because of his questionable mental condition, the employee lacked the requisite intent for assault and battery, thus making Subsection (2) of this section inapplicable, would be a fruitless attempt to circumvent the clear language of the section. *Wright v. University of Utah*, 876 P.2d 380 (Utah Ct. App.), cert. denied, 883 P.2d 1359 (Utah 1994).

Subsection (2) does not require that the person committing an assault and battery must be engaged in a governmental function in order for a government entity to qualify for immunity under this section. The immunity act specifies only that a court examine generally whether the activity that the governmental entity performs is a governmental function under § 63-30-30. *Wright v. University of Utah*, 876 P.2d 380 (Utah Ct. App.), cert. denied, 883 P.2d 1359 (Utah 1994).

#### **Discretionary function.**

The Department of Transportation's decision not to raise a concrete barrier during highway surface overlay projects was not an operational decision involving the negligent installation or maintenance of a traffic device, but involved a policy-based plan and the exercise of judgment and discretion; thus, the decision was a discretionary act shielded from liability. *Keegan v. State*, 259 Utah Adv. Rep. 13 (Utah 1995).

#### **Sovereign immunity.**

Acts that are core governmental functions or

are unique to government are outside the protection of Utah Const., Art I., Sec. 11; thus, in an action against a county building official and the county for injuries based on negligent inspection of a building and fraudulent issuance of a building permit, the defendants' acts were core governmental functions within the scope of the exceptions to waiver of immunity in Subsections (3) and (4). *DeBry v. Noble*, 257 Utah Adv. Rep. 3 (Utah 1995).

Subsections (3) and (4) of § 63-30-4 contemplate that a government employee can be sued for fraud even if the employee acted in a representative capacity; thus, even though the governmental agency may be immune from liability under this section, an employee who commits fraud in the course of his employment can be held personally liable. *DeBry v. Noble*, 257 Utah Adv. Rep. 3 (Utah 1995).

Cited in *Day v. State*, ex rel. Utah Dep't of Pub. Safety, 882 P.2d 1150 (Utah Ct. App. 1994); *Rocky Mt. Thrift Stores, Inc. v. Salt Lake City Corp.*, 887 P.2d 848 (Utah 1994).

### **COLLATERAL REFERENCES**

**A.L.R.** — Municipal liability for negligent performance of building inspector's duties, 24 A.L.R.5th 200.

## **63-30-11. Claim for injury — Notice — Contents — Service — Legal disability.**

### **NOTES TO DECISIONS**

#### **ANALYSIS**

Defendant's capacity.  
Notice.  
Sufficiency of notice.  
Cited.

#### **Defendant's capacity.**

Because it was clear that defendant engaged in the conduct complained of while performing his duties as a state employee and the plaintiff was aware that the defendant claimed to have acted under color of authority, the plaintiff could not complain on appeal that the Governmental Immunity Act did not apply because he meant to sue defendant as an ordinary individual, not for anything he did in the course of his employment by the state. *Nielson v. Gurley*, 888 P.2d 130 (Utah Ct. App. 1994), cert. denied, 899 P.2d 1231 (Utah 1995).

#### **Notice.**

Plaintiff's filing of a notice of claim with the governmental agency alleged to be responsible for his injuries, but not with the attorney general, did not satisfy the notice requirements of this section and § 63-3-12, even though the agency forwarded the notice to the attorney

general. *Litster v. Utah Valley Community College*, 881 P.2d 933 (Utah Ct. App. 1994).

This section does not waive the notice requirements for a suit against a state employee for acts or omissions occurring during the performance of his duties, notwithstanding a nexus between the claim asserted and "any contractual obligation." *Nielson v. Gurley*, 888 P.2d 130 (Utah Ct. App. 1994), cert. denied, 899 P.2d 1231 (Utah 1995).

#### **Sufficiency of notice.**

Notice was deficient that came more than one year after the claim arose; this deficiency was fatal to the trial court's jurisdiction. *Nielson v. Gurley*, 888 P.2d 130 (Utah Ct. App. 1994), cert. denied, 899 P.2d 1231 (Utah 1995).

In personal injury action against county, plaintiff fulfilled purpose of notice requirement by filing notice of her claim with the person in the county attorney's office designated by the county commission as the appropriate person to whom such notice should be sent. *Bischel v. Merritt*, 278 Utah Adv. Rep. 29 (Utah Ct. App. 1995).

Cited in *Bellonio v. Salt Lake City Corp.*, 284 Utah Adv. Rep. 27 (Utah Ct. App. 1996).

Tab 2



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FILED DISTRICT COURT  
Third Judicial District

JUL 31 1996

By SALT LAKE COUNTY  
Deputy Clerk

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IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY  
STATE OF UTAH

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JUDY SNELL and LEROY SNELL,  
Guardians and Conservators of  
the Estate of Kenneth Read  
Snell,

Plaintiffs,

v.

SALT LAKE COUNTY; UTAH COUNTY;  
UTAH DEPARTMENT OF  
TRANSPORTATION; CITY OF DRAPER,  
UTAH; and CITY OF LEHI, UTAH,

Defendants.

ORDER GRANTING  
CITY OF DRAPER'S MOTION  
FOR SUMMARY JUDGMENT

Civil No. 950906363 PI  
Judge William B. Bohling

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The Motion for Summary Judgment of City of Draper ("Draper") came on regularly for hearing on June 24, 1996. Plaintiffs were represented by their counsel John L. Young of Richards, Brandt, Miller & Nelson; Draper was represented by its counsel Dennis C. Ferguson of Williams & Hunt; appearing for defendant Utah County was David C. Richards of Christensen & Jensen. The issues presented by Draper's Motion for Summary Judgment were fully briefed and the Court, having reviewed the respective memoranda of the parties prior to the hearing, heard and considered the

argument of counsel and, being fully advised, finds that there is no dispute regarding the facts that are material to the case that would preclude ruling on Draper's Motion for Summary Judgment. The facts that are undisputed and that are material to the Court's determination of the duty issue, include the following:

1. Plaintiffs are the guardians and conservators of the estate of Kenneth Read Snell, who was seriously injured in an automobile collision in Draper, Utah on October 13, 1993.

2. The collision occurred on the east frontage road that parallels Interstate 15, where it intersects with a private road leading to a sand and gravel facility.

3. Mr. Snell was returning from the Lehi Animal Shelter, where he had picked up a load of animals to return to the University of Utah, who was his employer at the time.

4. Mr. Snell was traveling northbound on the frontage road and the University of Utah van he was driving collided with a large truck used to haul sand and gravel owned by Cazier Excavation. Darrell Casey, the driver of the Cazier truck, was turning left onto the private dirt road which was owned and maintained by Geneva Rock.

5. Draper City was responsible for the maintenance of the frontage road in question but not of the private road which intersected with it.

6. The place of the accident was approximately one mile north of the south Draper City boundary.

7. Prior to the accident, Draper had posted a 40 mile per hour speed limit sign on the west side of the frontage road which was visible to southbound traffic. Draper City had not placed on the east side of the frontage road any speed limit signs, or other signs warning of the intersection, along the one mile stretch from its southern-most border to the gravel facility road.

Based upon these undisputed facts, plaintiffs claim that Draper owed a duty to Kenneth Snell to have placed a speed limit sign on the east side of the frontage road. Plaintiffs claim that the failure to place such a speed limit sign was negligence and that the negligence was a proximate cause of the accident.

Draper seeks summary judgment on three theories: (1) it does not owe a duty to erect the speed limit sign or other warning signs, but a duty only to maintain those it has erected; (2) any duty that is owed is a duty owed to the public at large and plaintiffs' claims are barred by the public duty doctrine; and (3) immunity from suit has not been waived under Utah Code Ann. § 63-30-8, which waives immunity for injury caused by a defective, unsafe or dangerous condition of any highway, because Draper did not control the gravel road which is alleged to have created the dangerous condition. Plaintiffs acknowledge the general rule that a governmental entity has no duty to erect warning signs, even though it has a duty to maintain roads in a condition reasonably safe for travel. *Jones v. Bountiful City*,

834 P.2d 556 (Utah App. 1993); *De Villiers v. Utah County*, 882 P.2d 1161 (Utah App. 1994). Plaintiffs argue, however, that once Draper placed a speed limit sign controlling the southbound traffic that it had a duty to place a similar sign, in an appropriate position controlling northbound traffic.

Whether a duty exists is a question of law for the Court to determine. *Ferree v. State*, 784 P.2d 149 (Utah 1989); *LaMarr v. Utah Department of Transportation*, 828 P.2d 535 (Utah App. 1992). Based upon the undisputed material facts and the precedent established by current case law, the Court finds that there is no duty on the part of Draper to have erected a speed limit sign on the east side of the frontage road. As stated in *De Villiers v. Utah County, supra.*, and *Jones v. Bountiful City, supra.*, Draper's duty is to maintain those signs which it has placed. The Court is not persuaded that by having placed one sign on the west side of the frontage road restricting speed of southbound traffic to 40 miles per hour that Draper then has the duty to place other speed limit signs elsewhere.

With respect to the defense that the plaintiffs' claims are barred by the "public duty doctrine", Draper asserts that the holding of *Cannon v. University of Utah*, 866 P.2d 586 (Utah 1993) is dispositive. Under the "public duty doctrine", a duty to all is a duty to none. The Court finds that for Draper to be liable for a negligently-caused injury suffered by the plaintiffs, the plaintiffs must show a breach of duty owed to Kenneth Snell as an

individual, not merely a breach of an obligation owed to the general public at large. The Court finds that Draper, having posted 40 mile per hour speed limits for southbound traffic on the frontage road, did so for the public at large and had no duty to Kenneth Snell to post similar traffic regulations for his benefit northbound on the same frontage road.

Because the Court finds in favor of Draper on the duty issue, it does not reach the governmental immunity issue also raised in Draper's Motion for Summary Judgment. Therefore, based upon the undisputed facts and the legal conclusions recited herein, the Court hereby

ORDERS AND ADJUDGES that the Motion for Summary Judgment of Draper City be and the same is hereby GRANTED and plaintiffs' case against Draper is dismissed as a matter of law and with prejudice. Each of the parties is to bear his, her or its respective costs and attorneys' fees incurred herein.

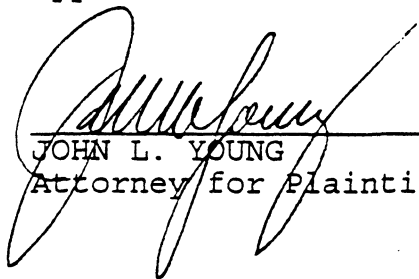
DATED this 30 day of July, 1996.

BY THE COURT

By

  
WILLIAM B. BOHLING  
District Court Judge

Approved as to form:

  
JOHN L. YOUNG  
Attorney for Plaintiffs