

2001

R.D. Andrus v. The State of Utah : Brief of Respondent

Utah Supreme Court

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Plaintiffs-Appellants,

vs.

STATE OF UTAH and its DEPARTMENT OF HIGHWAYS, SALT LAKE COUNTY, a political subdivision of the State of Utah, and GIBBONS & REED CO., a Utah corporation,

Defendants-Respondents.

ROBERT J. CAMERON,

Plaintiff-Appellant,

vs.

J. P. GIBBONS, dba GIBBONS & REED CONSTRUCTION COMPANY, the STATE OF UTAH, a sovereign, and the COUNTY OF SALT LAKE,

Defendants-Respondents.

RICHARD GROTEPAS,

Plaintiff-Appellant,

vs.

J. P. GIBBONS, dba GIBBONS & REED CONSTRUCTION COMPANY, and the STATE OF UTAH, a sovereign,

Defendants-Respondents.

Case No.
13716

BRIEF OF DEFENDANTS AND RESPONDENTS
STATE OF UTAH AND SALT LAKE COUNTY

Continued inside front cover.

FILED

Appeal from Judgment Entered by Ernest F. Baldwin, Jr.,
Judge in The District Court of Salt Lake County.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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Defendants-Respondents.

Case No.

13716

BRIEF OF DEFENDANTS AND RESPONDENTS
STATE OF UTAH AND SALT LAKE COUNTY

NATURE OF THE CASE

This case involves a claim for property damage caused by flooding.

DISPOSITION IN THE LOWER COURT

A jury trial, on the issue of liability, was had in the District Court commencing March 4, 1974. At the conclusion of the evidence each of the defendants moved for a directed verdict. These motions were denied and the case was given to the jury upon a special verdict requiring answers to 16 interrogatories (R. 721).

Based upon the answers returned by the jury, the court entered judgment as follows:

1. Judgment in favor of plaintiffs and against the State of Utah.
2. Judgment in favor of Salt Lake County and against the plaintiffs.
3. Judgment in favor of Gibbons & Reed and against the plaintiffs.
4. Judgment in favor of Gibbons & Reed and against the State of Utah and Salt Lake County on the crossclaims of the State of Utah and Salt Lake County (R. 743).

RELIEF SOUGHT ON APPEAL

Defendant, State of Utah, seeks a reversal of the lower court order granting judgment against it and

also a reversal of the judgment on its crossclaim against Gibbons & Reed.

Defendant, Salt Lake County, seeks an affirmance of the judgment entered in its favor.

STATEMENT OF FACTS

The Statement of Facts in appellants' brief is substantially accurate, although incomplete, and additional facts are, therefore, stated here.

1. *Plaintiffs.*

All of the plaintiffs lived west of the belt route (I-215) at the time of the flood. For purposes of the litigation, it was assumed that they all sustained some water damage.

2. *Chronology.*

A. *County Storm Sewer.* In 1964, at the request of Salt Lake County, the engineering firm of Caldwell, Richards and Sorensen, Inc., prepared a master storm drainage study of Salt Lake County. Included were recommendations for a drainage system in the area of Olympus Cove and the area west of Wasatch Boulevard (Ex. 73 at p. 80). In preparing the recommendations the following considerations were taken into account:

- (1) The ultimate development in the county projected to the year 2000 A.D.
- (2) The contemplated (but unconstructed) freeway.

- (3) Available rainfall intensity studies.
- (4) The estimated runoff based upon a ten year storm return frequency.

In 1966, the engineering firm of Nielsen and Maxwell prepared formal plans for a storm sewer line known as "Big Cottonwood Storm Sewer JJ, Unit No. 2" which would run from east to west on 4460 South. As part of the plan, a lateral was designed to receive storm water from the area known as Oak Cliff Drive. This differed from the Caldwell, Richards and Sorensen, Inc., Master Plan, primarily because the freeway plans had then been formalized, calling for a temporary end of the freeway at Oak Cliff Drive. The system was installed according to the Nielsen and Maxwell plans and specifications. The storm drainage system was prepared in accordance with acceptable engineering principles.

B. The Freeway Project. In the spring of 1968, the contract for the construction of the freeway was awarded to Gibbons & Reed Construction Company. The contract included by reference the Standard Specifications for Road and Bridge Construction, Interim Issue, March 1968 (Ex. "B"). Further reference to the contract between the State and the contractor will be made later. Construction called for removal and temporary relocation of Wasatch Boulevard.

C. Floods.

- (1) On April 3, 1969, construction of the freeway was well underway. Utilities had been relocated and structures were in various stages of completion.

Large excavated sections of earth were exposed. The drainage system of the freeway was partially installed.

At approximately 5:00 p.m. on that day it began to rain. There is no evidence as to the amount of rain which fell, but the storm was of moderate intensity. (See R. 1356-57). Plaintiff Kunkel reported some flooding of his residential property which was located immediately south of 400 South. This was in an area substantially removed from the other plaintiffs in this action and involved a separate incident.

(2) By Sunday, August 17, 1969, the freeway project was nearing completion. The freeway drainage system was installed, the ribbons of concrete roadway surface were substantially in place, and the top-soil for the cut-slopes had been placed prior to spreading. However, the cut-slopes were yet to be seeded for erosion control and the concrete ditch liners in the median strip and the gutters on either side of the freeway were not in place. Nor had curb and gutter been installed on the relocated Wasatch Boulevard. (R. 1475-76, 1487-88).

At approximately 5:15 p.m., a thunderstorm began to move across the county from southwest to northeast. (R. 1611). The storm was of unusual intensity. One observer in the area measured 2½ inches of rainfall in less than 45 minutes. (R. 1599-1600). According to historic rainfall intensity charts, based upon rainfall in Salt Lake County from 1900 (Ex. 82-D, R. 1614), this was a storm which statistically would occur less than once in every 100 years (Ex. 82-D, R.1267-80).

Even the plaintiffs' expert could only document two prior cloudbursts in the entire State of Utah that approached the magnitude of the August 17 storm. (R. 1310).

As the course of the storm progressed, surface water began to collect high in the Olympus Cove area. It accumulated in ever increasing amounts, and by the time it reached relocated Wasatch Boulevard, it was of torrent proportions. (*See Ex. 117-D*).

Some water ran across Wasatch Boulevard, cascaded down the fresh cut-slopes of the freeway project and collected in the "grade-sag" at approximately 4600 South. The water carried with it huge amounts of silt, dirt, gravel, and boulders, eroded from the cut-banks of the freeway and from above Wasatch Boulevard.

The eroded material entered and partially clogged the freeway drainage system and, in turn, clogged the county storm sewer. The grade-sag finally became full and the water poured over the west bank of the partially completed freeway and flooded the plaintiffs' houses.

ARGUMENT

POINT I

THE COURT PROPERLY ENTERED JUDGMENT IN FAVOR OF SALT LAKE COUNTY.

A. THE COURT HAS AUTHORITY TO GRANT JUDGMENT N.O.V. WHERE THE VERDICT IS AGAINST THE WEIGHT OF THE EVIDENCE.

Rule 50(b) of the Utah Rules of Civil Procedure provides:

(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than ten days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict;

Defendant Salt Lake County made a motion for directed verdict at the close of all the evidence. The jury returned its verdict on March 18, 1974. On March 27, 1974, defendant Salt Lake County filed its motion for "Judgment in its Favor and Against the Plaintiffs." (R. 733).

The appellant's argument that this Motion does not comply with Rule 50(b) is without merit. The rule does not state that the Motion cannot be made before the judgment; it says only that it cannot be made *later* than 10 days after judgment. The fact that the Motion was not denominated "Motion for Judgment Notwithstanding the Verdict," or that it was filed before the formal judgment was entered does not render it ineffective. The plain fact is that the Motion was timely filed by defendant Salt Lake County and seeks judgment in its favor, notwithstanding the adverse jury verdict. (R. 733). The trial court in entering judgment in favor of Salt

Lake County acted within the clear intent of Rule 50(b). This principle was succinctly stated in *Bunting Tractor Co. v. Emmett D. Ford Contractors Inc.*, 2 Utah 2d 275, 272 P.2d 191 (1954):

In entering any judgment it is the duty of the court to make such order, not inconsistent with the law, as will effectuate justice. . . . This policy is not an innovation to our law. It has long been embodied in both statutes and decisions that deviation from formal procedure shall not work a forfeiture of substantive rights in the absence of prejudice to the opposing party.

B. THE COURT CORRECTLY RULED THAT THE EVIDENCE DOES NOT SUPPORT THE JURY FINDINGS AGAINST SALT LAKE COUNTY.

The essential elements of a cause of action of this nature were defined in *Sanford v. University of Utah*, 26 Utah 2d 285, 488 P.2d 741 (1971). The plaintiffs' assertion that the evidence against Salt Lake County brings this case squarely within the holding of *Sanford* is inaccurate.

1. *Change in the natural flow of surface water.* Stated in the plaintiffs' brief (Brief for Appellant at 20-21), and undisputed by the evidence, is the fact that the *freeway project* changed the natural flow of drainage. While this is unquestionably true, there is no evidence or assertion that Salt Lake County was involved in any way with authorizing or constructing the freeway. This was entirely a State project.

In an effort to establish this element, the plaintiffs rely upon the fact that the County *permitted* the State of Utah to connect the freeway drainage system to the Salt Lake County storm sewer. This certainly did not change the natural flow of surface water; the natural flow was already changed by the construction of the freeway. The county's conduct did not cause any damage. In fact, it is obvious that the freeway drainage system being connected to the storm sewer diminished the flooding problem by carrying away a substantial portion of the runoff.

2. *Creation of a drainage system.* The evidence clearly indicates that Salt Lake County carefully planned, designed, and constructed a storm sewer system in an attempt to alleviate a critical drainage problem in the Olympus Hills area.

The evidence indicates that the storm sewer was designed according to the best engineering principles and practices (R. 1706, 1707), and it is obvious that without the storm sewer system the residents in the area below Olympus Hills would have suffered considerably more damage than they did in the storm of August 17, 1969.

The plaintiffs attempt to prove that Salt Lake County participated in the freeway project by showing that several Salt Lake County officials attended a pre-construction conference held on May 29, 1968. There is no dispute that these individuals were present at the meeting and that several potential problems with sur-

face water drainage were recognized and reviewed. The construction was to be undertaken by Gibbons & Reed pursuant to plans and specifications, which the jury found were not defective (R. 728, Interrog. H). The State was to supervise the contractor to assure compliance. Salt Lake County had no active responsibility nor jurisdiction in connection with the freeway project. Without joint conferences of this nature, planning and coordinating the construction of major public improvements would be impossible. Salt Lake County extended every cooperation to the State to permit construction of the freeway section with as little inconvenience and risk as possible to its citizens. Rather, attendance at such meeting is an evidence of Salt Lake County's due care in connection with the freeway project.

3. *Creation of a defective or dangerous condition.*

The plaintiffs attempt in their brief to show that the storm sewer constructed by Salt Lake County was dangerous and defective. However, all of the evidence indicated that the storm sewer system, itself, was constructed in accordance with sound engineering practices. Not even the plaintiffs' experts contended that the storm sewer system, standing alone, was defective or inadequate. Rather, the plaintiffs' experts said that, in their opinion, the drainage system of *the freeway itself* should have been protected by gratings to prevent the entrance of boulders and gravel. (Brief for Appellants at 23). The plaintiffs do not claim that it was the duty or prerogative of Salt Lake County to instruct or supervise the State of Utah, in designing the freeway drainage system, whether protective gratings should be used. In

any event the jury found the State's plans were not defective. Further, counties are subdivisions of the State, and as such are subservient to the State. *Salt Lake County v. Liquor Control Commission*, 11 Utah 2d 235, 357 P.2d 488 (1960).

Plaintiffs claim that Salt Lake County participated in creating a defective or dangerous condition in nine ways (Brief for Appellants at 26).

Plaintiffs' allegations will be answered in the order in which they have been presented in appellants' brief:

(1) "[I]t failed totally to maintain its storm drain system."

This allegation is without foundation. The system had fully and properly functioned prior to the storm of August 17 (R. 1687, 1727). An inspection following the storm revealed that it ceased to function properly because large boulders and gravel, which had been forced through lateral lines on the freeway drainage system, had plugged the 36" county line. There was no evidence that the plugging was caused from any lack of proper maintenance or that any prior reasonable maintenance would have prevented the plugging.

(2) [I]t failed to determine whether Line C when connected was free from obstruction."

After Line C was connected with the State freeway lines the sewer system functioned completely sat-

isfactorily. Several rain showers had occurred after it was connected and the unobstructed passage of runoff waters was clearly evident (R. 1687, 1727). The plaintiffs did not present any evidence that Line C was obstructed prior to the storm of August 17. It is an imposition on the court to urge this point.

(3) “[I]t failed to require that lead intakes were protected from accepting debris and rocks.”

Plaintiffs introduced some speculative evidence to the effect that the lateral drains within the freeway should have been grates to prevent debris from entering. However, the State of Utah highway engineers testified that such grating device were not specified in the plans because engineering technique and experience demonstrates that they are not needed on controlled access highways, and to some extent they impede the intake flow of runoff water. (R. 1743-45; 1768-69). The engineers indicated that such gratings are usually provided in connection with under-highway culverts where debris from a natural channel is expected.

Although the plans provided by the State did not require grates, the jury specifically found that the plans and specifications were not defective. (R. 728, Interrog. H). Plaintiffs’ claim that Salt Lake County is liable for failing to require grates is therefore without merit.

It should be noted that the contractor agreed as a part of its construction responsibility to “protect the Project” during construction. (Ex. D, Sheet No. 1).

If any duty existed to prevent boulders, gravel and silt from entering the storm drainage system during construction of the freeway as a result of the storm of August 17, it was that of the contractor.

(4) “[I]t permitted rocks and debris to enter the system.”

This allegation is merely a restatement of the claimed deficiency enumerated in (3). Obviously, there can be no legal fault assigned where no duty exists.

(5) “[W]hen the County agreed to the connection with its line, it knew it had constructed Line C with a very flat grade.”

There was no evidence presented which supports any claim that Line C was not designed and constructed in accordance with acceptable engineering standards. The fact that a section of this line clogged because rocks and gravel became lodged in it does not establish liability. Obviously, it would not have become plugged had the rocks and gravel not entered the line. Therefore, this claim is a restatement of claim (3) and is a belabored attempt to assign fault where none exists.

(6) “[I]t permitted the State to connect a larger drainpipe upstream to a smaller pipe.”

The State of Utah, out of an abundance of caution, replaced a section of the 36” county line which passed under the area where the freeway was constructed, with a 42” line. There is no evidence which would

support a finding that had this not been done the clogging would have been prevented.

(7) “[I]t permitted the State to drain runoff water into a system which was already inadequate.”

When the engineers prepared the plans and specifications for the storm drainage system which was to serve the area here involved, the anticipated maximum development of the area, projected to 2000 A.D., was considered, as well as the eventual construction of the freeway. Estimates of anticipated runoff were made and pipe capacities were determined utilizing the acceptable standard of a ten year storm return frequency. Plaintiffs' experts did not have any quarrel with this design criteria. All available data was utilized in arriving at the engineering estimates upon which the plans were based. The freeway was constructed after the County storm drainage system was installed. As noted above, the system as designed contemplated drainage from a section of the freeway. When the freeway was designed the estimated runoff could then be more accurately determined. When the estimated freeway runoff was added to the anticipated ten year storm return frequency runoff from county property, the *design* capacity of the County system was slightly exceeded, but the expected combined runoff was within the *as built* capacity of the system. (R. 1700-1706). Of course, if a storm exceeds the intensity for which the system was designed, some flooding is to be expected. The storm of August 17 was more than a “100 year” storm and greatly exceeded the capacity of the system. Even so, had the

lines not become plugged, there is no evidence that the County storm system would not have handled a sufficient quantity of the runoff to have prevented the flooding of which plaintiffs complain. Neither is there any satisfactory evidence in the record that the system *as built* was insufficient to handle the reasonably expected runoff from a ten year storm.

(8) “[I]t relied upon unsound data.”

The essence of this claim is stated in claim (7). However, to set this allegation in its proper setting the following statement appears appropriate:

During all of the approximately 100 years in which rainfall data has been accumulated by the United States weather gathering services, the stations have been located in the downtown Salt Lake City area. Until fairly recently such information has not been accumulated in the canyon areas near the mountains. The engineers used isohyetal maps and rainfall data as published by the National Weather Service whose background data was gathered as noted above. Plaintiffs claim this information was unreliable because it did not take into account the possibility that heavier rainfall occurs near the east mountains surrounding the city. They do not, however, suggest what data the engineers should have used, since no other data existed. Further, no satisfactory evidence was introduced indicating that acceptable engineering practice in designing storm drainage systems would have excluded the use of such data. The evidence by all engineers who had constructed similar

drainage systems, was that such data was invariably used.

Additionally, there was no evidence offered which would support a finding that had some other rainfall data been used, the flooding in this case would have been prevented or diminished.

(9) “[I]t permitted the removal of protective diking and curbing.”

This claim relates entirely to the construction phase of the project by the State’s contractor, Gibbons & Reed. This reference is apparently to an asphalt curb on old Wasatch Boulevard which was removed as a part of the construction of relocated Wasatch Boulevard. The contractor had the duty under its contract, to protect the work during construction. This was a matter between the State and its contractor concerning which Salt Lake County had no duty or right of supervision or control. Further, the plaintiffs can point to no evidence which would support a finding that the removal of the curb caused the flooding.

Plaintiffs point to the above nine items to establish that Salt Lake County participated in the creation of a dangerous and defective condition.

Two of these relate to the maintenance of the storm sewer system prior to the August 17 flood. (1 & 2) But plaintiffs do not point to a scrap of evidence to indicate that lack of maintenance of the storm sewer system had any relationship to the flood on August 17.

Six of the nine are allegations that Salt Lake County *permitted* the State or its contractor to engage in various activities. (3, 4, 5, 6, 7, and 9). However, the County had no right of supervision or control over the State of Utah or its contractor Gibbons & Reed. The County did extend cooperation to the State prior to and during the construction, but in so doing the County did not assume responsibility for the acts of the State or its contractor. Further, such conduct falls within the “discretionary function” exemption of the Governmental Immunity Act. This provision will be discussed later in this brief.

Finally, the plaintiffs argue that Salt Lake County relied on unsound data to predict storm intensity (8). But never do plaintiffs claim that any superior data was available or that reliance upon the data used was not in conformance with accepted engineering standards.

4. *Salt Lake County’s awareness of the danger.* The plaintiffs’ contention that Salt Lake County was fully aware of the possible flooding danger in this case is a misstatement of the evidence.

Olympus Hills was a rapidly growing suburban area in Salt Lake County. Certainly, Salt Lake County was aware that whenever the natural vegetation is removed from hillsides and replaced with homes, driveways and other structures, a greater runoff factor is created. This was taken into account by the engineers in designing the storm sewer system. But plaintiffs cannot point to any evidence in the record to indicate that Salt Lake

County had prior knowledge of, or that would justify the court in charging it with the numerous single occurring elements which combined to create the flooding in this case.

Each of the plaintiffs testified that they had never sustained damage from surface water runoff in the past. (Brief for Appellants at 9; R. 826, 835, 846, 855, 860, 880, 954, 980, 1018, 1024, 1058, 1063, 1078, 1432). Plaintiff Paul Kunkel did inform the County of a flooding problem prior to August 17, 1969, but this cannot be construed as notice to the County of any problem that caused the August 17 flood. Plaintiff Kunkel lives in an entirely different area from the other plaintiffs and his damage was caused by a completely different set of circumstances.

Plaintiffs also rely on a newspaper article of July 31, 1965, as an evidence of the County's knowledge of rainfall potential in the area. (Brief for Appellants at 28). The admission of this exhibit was based upon hearsay and was highly prejudicial. Defendant properly objected to its admission (R. 1843). But even so, the fact that a storm of similar intensity to that of August 17, had previously occurred does not affect the right of the County to rely upon the adequacy of plans and specifications prepared by qualified engineers it has employed for the purpose of designing storm drainage facilities. There was no attempt to show that the storm sewer plans did not meet reasonable engineering standards, or that the County was negligent in relying upon them.

The evidence indicated that the flood was caused by a rainstorm of unusual intensity at a time when the freeway was especially vulnerable to flooding. Whatever knowledge Salt Lake County had of possible flooding danger from other sources, there is no evidence that Salt Lake County was aware of, or should be charged with knowledge of, the danger that caused this flood.

5. *The plaintiffs' injuries.* For the purpose of this trial it was assumed that each of the plaintiffs had been damaged.

C. SALT LAKE COUNTY IS IMMUNE FROM SUIT UNDER THE FACTS OF THIS CASE.

The Utah Governmental Immunity Act, Section 63-30-1, *et seq.*, Utah Code Ann. (1953 as amended) provides:

Except as may be otherwise provided in this act, all governmental entities shall be immune from suit for any injury which may result from the activities of said entities wherein said entity is engaged in the exercise and discharge of a governmental function. (Sec. 63-30-3).

The Act then waives immunity in several broad areas, including dangerous condition of highways, culverts, etc., Sec. 63-30-8, Utah Code Ann. (1953 as amended), dangerous condition of structures and public improvements, Sec. 63-30-9, Utah Code Ann. (1953 as amended), and negligent acts or omissions of employees, Sec. 63-30-10, Utah Code Ann. (1953 as amended). This waiver of immunity, however, is not an admission of

liability. The plaintiff must still establish liability as in cases against individuals. The statute states:

. . . [C]onsent to be sued is granted and liability of the entity shall be determined as if the entity were a private person. Sec. 63-30-4, Utah Code Ann. (1953 as amended).

This court, in *Sanford v. University of Utah*, 26 Utah 2d 285, 488 P.2d 741 (1971) set out the three theories of recovery in a case of this nature:

An action for the invasion of a person's interest in the private use and enjoyment of his land is an action for private nuisance.

Any of three types of conduct may result in liability for private nuisance. . . . Liability for nuisance may rest upon an intentional invasion of the plaintiff's interests, or a negligent one, or conduct which is abnormal and out of place in the surroundings, and so falls fairly within the principal of strict liability. 26 Utah 2d at 291-92, 488 P.2d at 745.

In *Sanford*, there had been a previous flood caused by the same condition. The court relied upon knowledge of this prior flood to conclude that the invasion of the plaintiff's interest was intentional in the sense that:

defendant has created or continued the condition causing the nuisance with full knowledge that the harm to the plaintiff's interest is substantially certain to follow. 26 Utah 2d at 291, 488 P.2d at 745.

The present case differs from *Sanford* in that in this case the plaintiffs have never alleged nor proved

that the defendants proceeded with the full knowledge that harm to the plaintiffs' interest was substantially certain to follow. Rather, they claim that the defendants, or their employees were *negligent* in failing to properly construct I-215 and the storm sewer system.

Because the plaintiffs rely on *negligence* as an essential element of their cause of action, they also must rely on the waiver of immunity for negligence in Sec. 63-30-10, Utah Code Ann. (1953 as amended). And they are bound by the exceptions to immunity in that section.

1. *Salt Lake County is immune when the exercise of a discretionary function is involved.* Sec. 63-30-10(1) preserves political subdivisions' governmental immunity for a discretionary function. That section provides :

Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of his employment except if the injury :

(1) arises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused, . . .

In *Velasquez v. Union Pac. RR.*, 24 Utah 2d 217, 469 P.2d 5 (1970) the Utah Supreme Court interpreted this provision. The court there held that failure of the Utah Public Service Commission to require less than the most improved warning sign available at a railroad

crossing was a discretionary function and would not give rise to liability.

Conversely, in *Carroll v. State*, 27 Utah 2d 384, 496 P.2d 888 (1972), this court held that the decision of a road supervisor to use earthen berms as a means of warning drivers of an abandoned road was not a discretionary function. In so holding, the court stated:

In the instant action, the decision of the road supervisor to use berms as a sole means of protection for the unwary traveler was not a basic policy decision essential to the realization or accomplishment of some basic governmental policy, program, or objective. His decision did not require the exercise of basic policy evaluation, judgment and expertise on the part of the Road Commission. His determination may properly be characterized as one at the operational level of decision making. 27 Utah 2d at 389-90, 496 P.2d at 891.

In so holding the Utah court followed the numerous federal cases that apply the "operational-policy" distinction that determines whether a function is discretionary for purposes of the Federal Tort Claims Act, 28 U.S.C. 2671, *et seq.*, a statute after which the Utah Governmental Immunity Act was clearly patterned. *See, e.g., Indian Towing Co. v. United States*, 350 U.S. 61 (1955); *Dalehite v. United States*, 346 U.S. 15 (1953); *Sisley v. United States*, 202 F. Supp. 273 (D. Alas. 1962).

Plaintiffs' claims against Salt Lake County fall within one of the following claimed areas of deficiency: (1) Failure to properly inspect the system; (2) Its

agreement with the State in which freeway drainage was tied into the County system; (3) Failure to supervise and control the State's project; and (4) Reliance upon certain engineering data which was included in the storm drainage plans approved by the County Commission. With the exception of (1), which will be considered later, such actions were clearly not taken at the "operational level," but involved the exercise of basic policy evaluation, judgment, and expertise and are "discretionary functions" as defined in the Act. And insofar as category (3) is concerned, the County had no right of control or supervision over the State's project.

2. *Salt Lake County is not liable for failure to inspect.* Sec. 63-30-10(4), Utah Code Ann. (1963 as amended) provides another exception from liability when the action upon which liability is based: "arises out of a failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property, . . ."

As noted above, there is no evidence that Salt Lake County knew of any dangerous condition in its storm sewer system, even if one were shown to exist. Neither can plaintiffs contend that the County *should have known* of such a dangerous condition by conducting an inspection. To the extent plaintiffs base their action upon Salt Lake County's failure to inspect, they are barred by Sec. 63-30-10(4), Utah Code Ann. (1953 as amended). In any event, there is no evidence that an inspection, even if conducted, would have revealed any dangerous defect in the system.

POINT II

PLAINTIFFS CANNOT RECOVER UNDER THE DOCTRINE OF INVERSE CONDEM- NATION.

Inverse condemnation is an action brought against a governmental entity to recover the value of property which has been appropriated without the formal exercise of the eminent domain power. *Ossman v. Mountain States Telephone and Telegraph Co.*, 511 P.2d 517, 519 (Colo. App. 1973); *Thornburg v. Port of Portland*, 233 Ore. 178, 375 P.2d 100 (1962).

The plaintiffs do not have a right of recovery under the facts of this case apart from the Utah Governmental Immunity Act (Utah Code Ann. §63-30-1, *et seq.*).

The law in Utah was clearly stated by Mr. Justice Henriod in *Fairclough v. Salt Lake County*, 10 Utah 2d 417, 354 P.2d 105 (1960). In that case the Utah Road Commission reduced the grade of a highway to about 16 feet below the abutting owner's land. Consequently, access to the property was limited and the value reduced accordingly. In reversing the trial court's denial of a motion to dismiss the court held:

[C]onsistently and historically we have ruled . . . that Art. I Sec. 22 of our Constitution is not self-executing, nor does it give consent to be sued, implied or otherwise; and that to secure such consent is a legislative matter. . . .

This doctrine was followed consistently in every case that put the issue before this Court. *E.g., Holt v. Utah*

State Road Comm'n., 30 Utah 2d 4, 511 P.2d 1286 (1973);
Hampton v. State, 21 Utah 2d 342, 445 P.2d 708 (1968).

The Court wisely forbore assessing damages against the State or its subdivisions until the will of the people could be expressed by the legislature. If the Court were now to hold that a governmental entity is liable for negligent property injury outside of and beyond the Governmental Immunity Act, it would be substituting its own judgment for that of the legislature. As Mr. Justice Crockett said in *Hjorth v. Whittenburg*, 121 Utah 324, 241 P.2d 907, 909 (1953):

This phase of our law is well established and of long standing. If it is to be changed, that must come through the sovereign power of this commonwealth, the people, speaking through the legislature.

POINT III

THE TRIAL COURT ERRED IN ENTERING JUDGMENT AGAINST THE STATE.

The jury found that the "highway project created by the State of Utah was unreasonably defective or dangerous." (R. 727). As a result of this finding the trial court entered judgment against the State.

The State did not "create" the conditions which plaintiffs claim gave rise to the flooding. Rather, the State planned the project and engaged Gibbons & Reed to construct the highway who thereafter failed to properly "protect the project" during construction. (R. 782,

Interrog. J). The contract called for a completed facility. The State provided plans and specifications which the jury specifically found were not defective in any way. (R. 728, Interrog. H) The planning of I-215 is clearly a discretionary function, and since there was no showing of negligence which can be properly attributed to the state, the judgment against it should^{not} be permitted to stand.

A. THE JURY DID NOT FIND THAT THE STATE OF UTAH WAS GUILTY OF NEGLIGENCE.

As stated above, in relationship to Salt Lake County, in order for a governmental entity to be liable, the plaintiff must show that:

(1) liability would exist if the entity were a private person, Sec. 63-30-4, Utah Code Ann. (1953 as amended) and

(2) that immunity is waived under either Sec. 63-30-8 or 63-30-9 or 63-30-10, Utah Code Ann. (1953 as amended). In addition, if the plaintiff relies on the waiver of immunity under Sec. 63-30-10, he must show that his action does not fall within one of the exceptions thereunder.

As noted above, in a case of this nature, plaintiffs must prove their case under one of three theories: the invasion must be intentional; or it must be negligent; or it must be so unusual as to give rise to strict liability.

In this case the plaintiffs do not claim that the invasion of their interest was intentional. Nor do they

claim that freeway construction is a proper case for strict liability. Rather, they base their action on *negligence*.

The jury, however, did not find that the State of Utah was negligent. The trial court submitted 16 interrogatories to the jury under the special verdict. Three of these related to the State. In Interrogatory "H" the jury specifically found that the plans which the State provided were in accordance with approved engineering standards. (R. 728). In Interrogatories "A" and "D" the jury found that the highway project was unreasonably defective or dangerous. (R. 721, 727). A finding of "*unreasonably defective and dangerous*" does not establish a cause of action against a private person. Nor does a finding of "unreasonably defective and dangerous" establish negligence. Such a finding is the hallmark of strict liability. See, Restatement of Torts, Second, §402A. Although such a finding may be in some circumstances a basis for liability, such as in the sale of a dangerous product, it is not applicable to facts surrounding the construction of a freeway by the State, as contemplated under the Utah Governmental Immunity Act.

B. GOVERNMENTAL IMMUNITY WAS NOT WAIVED FOR THE PLANNING OF I-215, SINCE PLANNING IS A DISCRETIONARY FUNCTION.

Because plaintiffs rely upon *negligence* as the basis for their cause of action, the exceptions listed in Sec. 63-30-10, Utah Code Ann. (1953 as amended), are applicable. Subsection (1) provides that negligent acts or

omissions of an employee of a governmental entity committed within the scope of his employment is waived "... except if the injury: (1) arises out of the exercise or performance or the failure to perform a discretionary function, whether or not the discretion is abused,...."

This provision of the Utah Governmental Immunity Act was patterned after Federal Tort Claims Act, 28 U.S.C. 2671, *et. seq.*, so federal cases are instructive. *Sisley v. United States*, 202 F. Supp. 273 (D. Alaska 1962) was a case brought under the Tort Claims Act almost identical on its facts to the one at the bar. The plaintiffs there had been injured by a flood caused by defective drainage in a highway built by the United States. The Court held:

Plaintiffs concede that the acts of constructing the highway and deciding where the highway should be built are discretionary functions, but contend that when the government undertakes an act it may not be negligent in the performance thereof or must exercise due care, in what the Supreme Court has characterized as the "operational level" of governmental activity.

Clearly the acts here complained of relating to the planning of the construction of the grade and culverts in the improvement of the Glenn Highway are not negligent acts committed by a Government employee on the "operational level" but are acts calling for the exercise of judgment and discretion in the planning of the highway. Errors in judgment, if such may be found, are not negligence in construction. These plans were the result of policy judgment and decision and as we have noted, where there is room for such there is discretion. This view conforms to what

is believed to be the true intent of this important exception. Otherwise the Government would be liable to a property owner for every error of judgment in the planning and construction of public roads. 202 F. Supp. at 274-75.

The Utah Supreme Court has also adopted this "operational-planning" distinction in *Carroll v. State*, 27 Utah 2d 384, 496 P.2d 888 (1972).

When the legislature chose to except from liability negligent acts that arise out of discretionary functions, it recognized that enormous projects such as freeway construction may not be accomplished without the possibility of harm to some individuals. Nevertheless, the legislature recognized that the common good requires that such projects be built. It, therefore, excepted from liability, negligent acts in the planning of such projects so that the state would not "be liable to a property owner for every error of judgment in the planning and construction of public roads." *Sisley v. United States*, 202 F. Supp. at 275.

The decisions that were made here involved the exercise of basic policy evaluation, judgment and expertise on the part of the State. Such factors as relative cost, safety, maintenance expense, and feasibility had to be carefully weighed. The Court should recognize the policy decision made by the Utah Legislature in making the State immune from suit in this discretionary area and should not hold the State liable for the planning of I-215.

C. THE STATE OF UTAH CANNOT BE HELD LIABLE FOR INADEQUATE INSPECTION.

In addition to planning I-215, the only other aspect in which the State became involved was general inspection and supervision to assure the project was completed according to the plans and specifications. To the extent the plaintiffs rely upon any failure of the State to make inspection, or making a negligent inspection, their action is barred by Sec. 63-30-10(4), Utah Code Ann. (1953 as amended), which preserves immunity in such instances.

Because all activities in which the State was engaged in this project — planning and inspection — are areas of immunity under the Governmental Immunity Act, the judgment against the State cannot stand.

POINT IV

THE COURT ERRED IN NOT ENTERING JUDGMENT FOR INDEMNITY AGAINST GIBBONS & REED COMPANY.

The contract between the State of Utah and Gibbons & Reed Construction Company for the construction of the highway incorporated by reference the Standard Specifications for Road and Bridge Construction, Interim Issue, March 1968 (Ex. D, Sheet No. 1).

Those Standard Specifications provide in part as follows:

107.14 *Responsibility for Damage Claims:* The Contractor shall indemnify and save harmless the State, its officers, and employees, from all suits, actions, or claims of any character brought

because of any injuries or damage received or sustained by any person, persons, or property on account of the operations of the said Contractor; or on account of or in consequence of any neglect in safeguarding the work; . . . (Emphasis added).

Indemnity agreements, like all other contracts, are construed with a view to determining the actual intention of the parties. *Southern Calif. Gas. Co. v. Ventura Pipe Line Const. Co.*, 309 P.2d 849, 851 (Cal App. 1957); *Luke v. American Surety Co.*, 114 P.2d 950 (Okla. 1941). As stated in 41 Am. Jur. 2d, *Indemnity*, §13:

A contract of indemnity is construed in accordance with the rules for the construction of contracts generally. The cardinal rule is to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles. To do this, it has been held that the courts must consider not only the language of the contract, but the facts and surrounding circumstances under which the contract was made. Of course, where the terms of the contract are considered by the court to be clear and unequivocal, no question of construing or interpreting the agreement arises.

Contracts of indemnity, if ambiguous or uncertain, must receive a reasonable construction so as to carry out rather than defeat the purpose for which they were executed. To this end they should neither, on the one hand, be so narrowly or technically interpreted as to frustrate their obvious design, nor, on the other hand, so loosely or inartificially interpreted as to relieve the obligor from a liability within the scope or spirit of their terms.

Manifestly, the intention of the contract provision in this case is to protect the State from suits exactly like this one. Nothing could be a better example of "damage received or sustained by any person, persons, or property on account of the operations of the said Contractor," than a flood caused by the construction of the highway. This alone should be enough to require indemnification under the contract.

The Utah court has consistently held that if a contract of indemnity is to relieve a party of its own negligence, that intention must be clearly and unequivocally expressed. *Barrus v. Wilkinson*, 16 Utah 2d 204, 205, 398 P.2d 207, 208 (1965); *Union Pac. R.R. v. El Paso Nat. Gas Co.*, 17 Utah 2d 555, 259, 408 P.2d 910, 913 (1965); *Howe Rents Corp. v. Worthen*, 18 Utah 2d 263, 264, 420 P.2d 848, 849 (1966).

In each of these cases the party seeking indemnification was guilty of active negligence and the party against whom indemnity was sought was *wholly without negligence*. In contrast, in this case, the contractor had control of the instrumentality causing the damage and was guilty of primary negligence. Furthermore the jury did not find that the State was negligent. Rather the jury found that the highway project was unreasonably defective or dangerous. The reasonable conclusion to be drawn from the jury finding that the project was "unreasonably defective or dangerous" in light of its further finding that the plans and specifications were prepared in accordance with approved engineering standards (R. 728), is that the negligence of Gibbons &

Reed in failing to take reasonable precautions to protect the project during construction was the active and effective, if not the sole cause, of the flooding. (R. 728, Interrog. J).

CONCLUSION

The trial court properly entered judgment for Salt Lake County because there was no evidence that Salt Lake County was negligent in failing to provide adequate drainage facilities. Furthermore, all the activities undertaken by Salt Lake County in connection with the freeway project were either discretionary in nature or exempt from liability under the "inspection" provisions of Section 10 of the Utah Governmental Immunity Act.

The trial court erred in entering judgment against the State of Utah because there was no satisfactory evidence that the State of Utah created a dangerous condition. The State's only activities in connection with the construction of the freeway were planning and inspection. The jury found that the plans and specifications provided by the State were in accordance with approved engineering standards. Additionally, highway planning is a discretionary function and cannot serve as a basis for liability under the Utah Governmental Immunity Act. Neither can plaintiffs rely on the failure to make an inspection, or in making a negligent inspection, by the State of Utah as a basis for liability, because immunity for such conduct is preserved by the Utah Governmental Immunity Act. Further, there was

no evidence offered which would support such a finding in any event.

Defendant Gibbons & Reed constructed the project, and under its contract with the State unequivocally agreed to indemnify the State for damages the State may incur because of the contractor's activities during construction and specifically for any failure to protect the project. The jury found that Gibbons & Reed failed to "protect the project" during construction and that such was a proximate cause of the flooding and damage.

It is respectfully submitted that if plaintiffs are entitled to recover, their remedy is exclusively against Defendant, Gibbons & Reed.

Finally, if it is determined that the State has liability to the plaintiffs this Court should grant judgment in favor of the State of Utah on its crossclaim against Gibbons & Reed, because of the indemnity contract between Gibbons & Reed and the State.

Respectfully submitted,

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