2001

# Arthur L. Murray v. Ogden City and The Standard Corporation : Brief of Appellant

Utah Supreme Court


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IN THE SUPREME COURT OF THE

STATE OF UTAH

ARTHUR L. MURRAY,

Plaintiff and Appellant,

vs.

OGDEN CITY, a Municipal Corporation, and THE STANDARD CORPORATION, a Utah Corporation,

Defendants and Respondents.

Case No. 14249

# BRIEF OF APPELLANT

Appeal from the Judgment of the
District Court of Weber County
Honorable John F. Wahlquist, Judge

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# BRIEF OF APPELLANT

## STATEMENT OF THE KIND OF CASE

This is an action for personal injury brought by the Appellant for injuries sustained by Appellant while traversing a sidewalk, wherein there was installed a water meter manhole cover by the Ogden City Water Works Department, a proprietary function of Ogden City, and The Standard Corporation as the occupier and owner of premises abutting the sidewalk area wherein the Appellant sustained injuries.

## DISPOSITION IN LOWER COURT

The Respondents both filed Motions for Summary

Judgment, which was granted by the Lower Court.

## RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the Judgment and final Order of the Lower Court, seeking to hold one or both of the Respondents for the injuries sustained by the Appellant.

## STATEMENT OF FACTS

On or about December 7, 1973, the Appellant was traversing a sidewalk going west on 23rd Street, together with his wife and son. (Dep.10) At approximately 455 - 23rd Street, the Appellant stepped on a water meter cover (Dep.16) whereupon the lid on the water meter cover slid away and the Appellant fell into the hole left vacant by the movement of the water meter cover. (Dep.18,52). The Appellant stated that the water meter cover was approximately two feet in diameter, and that at the time of the injury, it was night time and it was dark. (Dep.31,60)

The area, wherein the injury to the Appellant occurred and wherein the water meter cover was installed on the sidewalk, was in an area abutting the property owned by the Respondent, The Standard Corporation, (R-28) and Ogden City has admitted, that at least since 1968, they maintained and inspected the sidewalk in the area herein

in question (R-29).

The Respondent, Ogden City Corporation, alleges that it abandoned the water meter that was installed in said water meter hole in 1968 and that the Respondent, The Standard Corporation, was a tenant and occupier of the premises in 1968. (R-58)

A Pre-Trial proceeding was set for and heard on May 20, 1975, at which time all of the Respondents and the Appellants were represented by Counsel and at which time the Court ordered that more discovery work was needed and "may continue up to ten days before the trial", and so made a Pre-Trial Order (R-39). May 13, 1975, trial was set for September 10, 1975. (R-36) Subsequent thereto, on July 31, 1975, the Appellant submitted Request For Admissions, Interrogatories, and for Production of Documents upon the Respondent, The Standard Corporation, (R-63,-71).

That prior to opportunity for Answers to the First Set of Interrogatories, Admissions, and Production of Documents sought by Appellant in his discovery proceedings, the Respondent, The Standard Corporation, filed a Motion for Summary Judgment on July 14, 1975, (R-46) and the Respondent, Ogden City, filed a Motion for Summary Judgment on July 25, 1975. (R-47) Both Motions for Summary Judgment were granted without

giving the Appellant any opportunity for discovery in the above entitled action. (R-76,-78)

The Deposition in the Record before this Honorable Court is sealed, but the attention of the Court is called to the fact, that the Court issued an Order allowing publication of the Deposition of the Appellant, Arthur L. Murray, and that the failure of the Clerk of the Lower Court to number the sealed Deposition has required the Appellant in his Brief to refer to the Deposition by the abbreviation for Deposition and make reference to the specific page numbers of said Deposition.

## ARGUMENT

### POINT I

OGDEN CITY HAS LIABILITY FOR MAINTENANCE OF ITS SIDEWALK.

The Respondent, Ogden City, in its pleadings has admitted that the water meter cover was a part of the operation of the Ogden City Water Works Department. (R-49,-54) That the lid upon which the Appellant alleges he stepped and which skidded by its normal position, allowing Appellant to fall into a hole was a Water Works meter cover.

This Court in Gordon vs. Provo City, 15 Ut.2d 287, 391 P.2d 430, (1964), held in an action against the City

of Provo, wherein the Plaintiff suffered injuries when he stepped on a loose water meter lid, that the City operating the water system as a commercial venture has liability for any negligence, whether the meter was on the private property of a person or in the street.

This Court stated that the operation of a water system is a commercial venture in a proprietary capacity by a City and it has liability for any negligence in operating or maintaining such facility.

This Court further held in the Provo City case, that the circumstances under which the Plaintiff in that action stepped upon a water meter lid, upon a meter located near the edge of the Plaintiff's front lawn, that negligence under the facts introduced in that particular case could still hold the City to be liable, even without any previous notice.

It is pointed out to the Court, that in the instant matter, the meter is located right on a sidewalk at 23rd near Washington Boulevard, and further, that there was no opportunity for discovery by Appellant, let alone a jury trial in this matter, so that there is strictly a trial on self-serving Affidavits of employees of Ogden City, without being able to present to a jury or to this Court the manner

in which the water meter lid tilted and skidded exposing the hole into which the Appellant herein fell, was or should have been secured in the ring to which it was supposed to be fastened.

In Headley vs. Hammond Building, 33 P.2d 574, Sup.Ct. of Montana, (1934), is an action wherein the Plaintiff therein sought damages for injuries sustained in a fall caused by the negligence of the Defendant for allowing a metal strip or cleat to protrude or project above the level of a temporary plank sidewalk. The Court discussed the liability, recognized by the Court of the liability of an abutter, where particular use of said sidewalk is made by the abutter, such as in the general manhole cases, and held that in the instant case before the Court of Montana, that the rule that an abutting owner is not liable for failure to keep the sidewalk in front of its premises in repair, must prevail in the absence of facts bringing the case within the recognized exception, which is illustrated by cases within the recognized meter boxes, and other devices of similar character located in the sidewalk; and held that the abutter had no liability, but that the liability was that of the municipality. (Emphasis added)

In Egelhoff vs. Ogden City, 267 P. 1011, Sup.Ct. of Utah, (1928), was an action wherein the Plaintiff was

the owner of property and the Defendant, Ogden City, maintained a wooden stave pipe for the purpose of conveying water, and as a result of maintaining its pipe line, the City caused water to seep through into the mountainside, and thereby caused the mountainside to slide down onto the Plaintiff's premises and property, and the City was found negligent in failing to properly maintain its water pipes and had liability to the Plaintiff. The Court held that the operation of the water pipe was a part of the municipal corporation's selling and operating its own water system, and was required to exercise due care in the performance of such service.

In Nestman vs. South Davis County Water Improvement District, 16 Ut.2d 198, 398 P.2d 203, (1965), was an action wherein home owners sought to recover for damages from flood caused when a water improvement reservoir gave way, and the Supreme Court stated:

> Where a public body, which would otherwise be entitled to sovereign immunity, engages in an activity of a commercial or proprietary character, the protection does not exist. Specifically, we have held that when a City carries on the business of operating a water system and suppling water for fees, it is a proprietary function, and the City is liable for damage or injury caused by its negligence in connection therewith.

In Davis vs. Provo City Corporation, 265 P.2d 415, (1953), this Court again reaffirmed the liability of a City for damages arising from its negligent conduct in a

proprietary capacity, and restated the Rule of Law as follows:

> This Court has steadfastly followed the majority rule in requiring that the City respond in damages when the City is negligent when acting in a proprietary capacity, but exempting it when the City is negligent in performance of governmental duties.

In State Water Pollution Control Board vs. Salt Lake City, 6 Ut.2d 247, 311 P.2d 370, (1957), this Court held:

> It is generally recognized that because the municipality acts in a somewhat dual capacity - on the one hand, as a subdivision of a State exercising governmental powers, and on the other, engaging in activities similar to those of a private corporation - the sovereign immunity of the State extends to the municipality only when it is acting in a governmental capacity, whereas it is responsible for negligence in connection with any proprietary activity. **and it has sometimes been held, that the operation of sewer and water works systems is a proprietary rather than a governmental activity and the City is liable for negligence in such operations.

Similar decisions and holdings of the Supreme Court of Utah are reflected in the cases of Brown vs. Salt Lake City, 33 Ut. 222, 93 P. 570; Kiesel vs. Ogden City, 8 Ut. 237, 30 P. 758.

## POINT II

ABUTTING PROPERTY OWNER MAY HAVE A DUTY OF CARE AND LIABILITY FOR CONDITION OF SIDEWALK.

The question to be determined, after a hearing of

evidence in this matter, sufficient to establish the facts, would be as to whether or not the water meter cover was placed in the sidewalk for the sole benefit of the abutter, or whether it is placed for the convenience of the Ogden City Water Works Department in its capacity as a seller of water and services to individuals and in the proprietary capacity of the municipality.

The case of Latell vs. Cunningham, 148 N.W. 981, the Supreme Court of Minnesota held that both the City and the abutter had liability when the Court stated:

> It follows that both Defendants are liable - the City, because it has control of the streets and sidewalks within its borders, and because it ought to have known the existence of its dangers; and the Defendant, Cunningham, because he maintained the cover, and owed the duty to use reasonable care to see that it did not become a danger. It is not necessary that actual notice of the defect be brought home to either Defendant and the evidence sufficiently shows that both Defendants ought to have known of the condition.

The injury herein referred to by the Court was where the Plaintiff tripped on a coal hole cover in a sidewalk, slipped and fell, and caused injuries to his person.

In Sexton vs. Brooks, 245 P.2d 496, the Sup. Ct. of California, (1952), was an action wherein the Plaintiff fell on a sidewalk in front of the Defendant's place of business, the Court stated that a landowner may be liable,

in addition to the City, under the circumstances, where the public sidewalk has been constructed or altered by the City in a particular manner for the special benefit of the landowner's property. In this case, a coal chute had been constructed in the sidewalk, and the Court held that the City is charged with the duty of maintaining the sidewalks within its limits in a safe condition for use in the usual mode by pedestrians who so use the sidewalk. That because a City is charged by the legislature with the maintenance of the safety of its sidewalks and grants to the City's control over the streets and sidewalks, as provided under Sections 15-8-23 and 15-8-11, Utah Code Annotated, any use made of a sidewalk in a manner where the use is not properly constructed or maintained for the safety of the public, can be a nuisance per se, and that the adjoining owner has no more right than any other person to do an act which renders the use of the sidewalk hazardous, or less secure than it would be but for such an act, and that one who so acts is guilty of a nuisance and liable to any person who using due care is injured thereby.

The Court further held in the matter herein, that upon the transfer of the entire interest and possession of the property to another, that the duty runs with the land and the duty would be cast upon the grantee.

There is a conflict of testimony in the instant action as to when the water meter was removed from 23rd Street, the area wherein the Appellant was injured, and a new service was installed for The Standard Corporation on Adams Avenue, and only through proper evidence and discovery can it be proven that the use of the property was continuous in The Standard Corporation from the use of the meter on 23rd Street to the use of the meter on Adams Avenue, and further, as to who would have liability or responsibility for the maintenance of the abandoned water hole on 23rd Street as to the maintenance of the lid on the water hole, so that an injury, such as that which occurred to the Appellant herein, could have been prevented by proper care.

The same principle as expounded in the previous case was stated in Peters vs. City and County of San Francisco, 260 P.2d 55, Sup. Ct. of California, (1953), where a pedestrian was injured when he stepped into a depression made on the sidewalk by the landowner's predecessor, and the Supreme Court of California held the City liable for its own negligence to the pedestrian, and also held that:

> The duty to maintain portions of the sidewalk which have been altered for the benefit of the property runs with the land, and a property owner cannot avoid liability on the ground, that the condition was created at the request of its predecessor in title.

The Court further held:

> It is also well settled, that in the absence of notice and knowledge to the contrary, a pedestrian making normal use of the public sidewalk has a right to assume that it is in reasonably safe condition, and while he must use ordinary care for his personal safety and make reasonable use of his faculties to avoid injury to himself, he is not required to keep his eyes fixed on the ground or to be on constant lookout for danger.

The Court cited as authority for this point of view, not only a large number of California cases, but in addition, cited Berland vs. City of Hailey, 61 Id. 333, 101 P.2d 17; Little vs. Kansas City, 239 Mo.App. 1007, 197 S.W.2d 1005; and 19 McQuillan, Municipal Corporations, (1950), Sections 54.122-54.123.

The Court further held that whether or not the Plaintiff makes reasonable use of her faculties and whether she should have observed the condition which caused her injury were questions of fact, and cited for same Eastlick vs. City of Los Angeles, 29 Cal. 661, 177 P.2d 558; Owen vs. City of Los Angeles, 82 Cal. App.2d 933, 187 P.2d 860.

In the instant matter before the Court, the Appellant, together with two members of his family, was walking down 23rd Street to Washington Boulevard at approximately 8:30 in the evening, when it was dark and Appellant could in no way have had knowledge of the condition of the water meter

cover, and in fact nowhere in the Deposition taken by the Respondents of the Appellant is there any evidence of knowledge of the Appellant of the condition of the water meter cover.

In Safeway Stores vs. Billings, 335 P.2d 636, the Supreme Court of Oklahoma, (1959), heard an action wherein a pedestrian suffered injuries occasioned by a fall after dark, with branches of a felled tree lying on abutting property, wherein the limbs extended across the sidewalk. The Court held it was negligent to have obstructed the sidewalk and that the allegations by the Defendant, that neither its employees or agents had felled the tree on the property, at the time that the Plaintiff was injured was not material; that where the owner of property abutting on a public way maintains thereon an unauthorized obstruction to public travel which is dangerous to those using the public way, he may be held liable to persons who are injured as a proximate result thereof, and that the municipality also had a duty, and in an appropriate action, the municipality and the abutting owner each might be liable to a Plaintiff for injuries sustained as a proximate result of such a public nuisance.

In Snider vs. City of Concordia, 320 P.2d 820, the Supreme Court of Kansas, (1958), had an action wherein a pedestrian sued for injuries when he fell into a water meter

pit located in a public sidewalk. The Court held, that where a City meter reader would be the only person responsible for the inspection of water meter pits, he should have seen the defect of the manhole cover on the sidewalk in time to give the City ample opportunity to remedy the defect. The negligence of the meter reader was the negligence of the City and was equivalent to actual notice in creating the liability of the City for injuries sustained by the pedestrian who fell into the water meter pit because of a defect in the manhole cover.

In the instant matter before the Court there is before the Court both the abutting property owner and the City of Ogden which operated a water works system in a proprietary capacity. There has been no show of negligence on the part of the Appellant and there has not been a proper opportunity for finding as to the specific acts of negligence of either or both of the Respondents herein, and it is submitted to the Court, that there is either liability in one or both of the Respondents, or there is a rule of absolute non-liability and immunity for injuries inflicted upon pedestrians using a public way, and that there is imposed a duty on the pedestrian to either walk with his head down and a flashlight to examine defects on the sidewalk as he traverses the public way, or a

liability for inspection, maintenance, and liability by those who have the benefit of the use of such implaced water meter.

POINT III

SUMMARY JUDGMENTS SHOULD NOT HAVE BEEN GRANTED TO THE RESPONDENTS.

The Appellant believes, that a chronology of the time element in the handling and filing of the action before the Court, is essential in view of the transcript of the hearing on the Motion for Summary Judgment, wherein the Court made allegations of the non-diligence of the Appellant in accomplishing more complete discovery, which appeared to be the basis for the granting of the Motions for Summary Judgment (R-92,-94).

The Complaint of the Plaintiff was filed on May 25, 1974, (R-1) and the Answer of The Standard Corporation was filed June 19, 1974, (R-5). An Answer and Cross-Complaint of Ogden City was also filed on June 19, 1974, (R-8). Notice of Taking of Deposition of Plaintiff was given by Ogden City on June 24, 1974, (R-13) and the Notice of Taking of Deposition of the Plaintiff by The Standard Corporation was filed July 11, 1974, (R-18).

The Plaintiff submitted Interrogatories to The Standard Corporation on December 24, 1974, (R-20) which were not responded to as of time of granting of Motion for Summary Judgment.

Request for Admissions were made by Standard Corporation of Ogden City on January 16, 1975, (R-22) and Answer to the Cross-Claim of Ogden City filed by The Standard Corporation on January 16, 1975. (R-24)

A Motion was made by Ogden City for the extension of time to respond to the Cross-Claim on February 14, 1975, (R-26) and Ogden City responded to the Request for Admissions by The Standard Corporation on February 14, 1975. (R-28)

On March 18, 1975, the Court gave Notice of Pre-Trial to be held on April 22, 1975, (R-33). On April 22, 1975, at time set for Pre-Trial, the Plaintiff was present and represented by Attorney Pete N. Vlahos, Esq., but neither of the Defendants were present nor represented by Counsel (R-34). The Court then ordered the Pre-Trial reset to May 20, 1975, (R-35). On May 13, 1975, the Court set trial in the matter for September 10, 1975 (R-36).

On May 21, 1975, The Standard Corporation made a Request for Production of Documents by Plaintiff for production of same to be made on June 23, 1975, (R-37).

On May 20, 1975, a Pre-Trial was held before the Honorable Ronald O. Hyde, and the Court made an Order for continuation of discovery until ten days prior to the trial date of September 10, 1975, and allowed the filing of a Cross-Claim by The Standard Corporation against Ogden City. (R-39) The Order of the Court being signed on June 2, 1975. (R-42)

A Motion for Summary Judgment was made by The Standard Corporation and was filed July 15, 1975, (R-43) and a Motion for Summary Judgment by Ogden City was filed on July 28, 1975, (R-47) with Objection and Affidavits of the Appellant filed July 31, 1975, to the Motion for Summary Judgment (R-56,-72).

A Request for Production of Documents, Request for Admissions, and Interrogatories was made by the Appellant of the Respondent, The Standard Corporation, on July 31, 1975, (R-63).

On August 5, 1975, a hearing was held before the Honorable John F. Wahlquist on the Motions of both of the Defendants (Respondents) (R-75), and the Court granted Judgments to both of the Respondents alleging no cause of action (R-76,-78).

The Appellant in his Designation of Record on Appeal

included a Request for Transcript of the Hearing before the Court (R-83) and also a complete transcript was ordered from the Reporter (R-84).

The Record before the Court evidenced by only nine sentences (R-92,-94) and evidences the granting of the Motion for Summary Judgment being based upon the non-discovery by the Appellant.

The Record before the Court reveals that the Appellant was following the Order of the Pre-Trial Judge, Ronald O. Hyde, and had submitted previously discovery process which had not been answered (R-26) and again on July 31 had submitted Interrogatories, Request for Admissions, and for Production of Documents on July 31, 1975, which was well ahead of the ten-day period prior to date of trial of September 10, 1975, (R-36) set by the Pre-Trial Judge for completion of discovery. Further, that the Objection to the Motions for Summary Judgment was made by the Appellant upon the specific grounds, among others, that the Appellant has not had time for completion of discovery in accordance with the Order of the Pre-Trial Court.

This Court stated in Ulibarry vs. Christenson, 275 P.2d 170, that a basis for the granting of a Summary Judgment is to expedite procedure and obviate trials where

no genuine issue of fact exists, that in the present matter before the Court, there was a foreclosure of allowance of any discovery, and that in affect, the decision was rendered by the Court based upon the self-serving Affidavits of the Respondents, all to the affect that they could see no reason why the meter lid should have been loose.

This Court in the case of Blackham vs. Snellgrove, 280 P.2d 453, (1955), adopted the language of Justice Murphy, who stated in the Hickman vs. Taylor case, 329 U.S. 495, 67 Sup. Ct. 385, that:

> The Pre-Trial Deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior Federal practice, the Pre-Trial functions of notice giving issue-formulation and fact-revelation were performed primarily and adequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving and invest the Deposition-discovery process with a vital role in the preparation before trial.

This Court has often stated its position on the granting of a Motion for Summary Judgment and has reasoned, that it is only where it is perfectly clear that there are no issues in the case, that Summary Judgment is proper.

In the instant matter before the Court, the pleadings, Affidavits, Answers of the parties to the Complaint filed

herein, when viewed in the light most favorable to Appellant, showed the existence of genuine issues as to material facts, and that with both the City of Ogden before the Court as a Respondent and in its proprietary capacity, and with the abutting property owner before the Court, that the Respondents could not have been entitled to a Judgment as a matter of law. See Green vs. Garn, 11 Ut.2d 375, 359 P.2d 1050; Bullock vs. Deseret Dodge Truck Center, Inc., 11 Ut.2d 1, 354 P.2d 559.

This Court further stated in Hill vs. Grand Central, Inc., 477 P.2d 150, (1970), that:

> Summary Judgment is never used to determine what the facts are, but are only to ascertain whether there are any material issues of fact in dispute. If there be any such disputed issues of fact, they cannot be resolved by Summary Judgment, even when the parties properly bring the Motion before the Court.

This Court further stated in Samms vs. Eccles, 11 Ut.2d 289, 358 P.2d 354:

> **It is the function of Courts and juries to determine whether claims are valid or false. This responsibility should not be shunned merely because the task may be difficult to perform.

This Court further pointed out in Finlayson vs. Brady, 121 Ut. 204, 240 P.2d 491, that the right to trial by jury is an ancient and valued right, and one not to be denied without compelling reasons.

In Raymond vs. Union Pacific Railroad, 191 P.2d 137, (1948), the Court stated:

> This Court is charged with the duty of protecting all of the rights of all litigants. This is specially true of those fundamental rights guaranteed by the State and Federal Constitution.

The Appellant submits to the Court, that the individual right of a single citizen cannot be subverted to the interest of the corporate Respondent, even if it is a municipality.

It is submitted to this Court, that the defenses of both Ogden City and The Standard Corporation was based in their Answer to the Complaint primarily upon the alleged contributory negligence of the Appellant, although the record does not in any way substantiate any negligence on the part of the Appellant, this Court stated in Linden vs. Anchor Mining Company, 58 P. 355, that:

> Where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by the jury; and this, whether the uncertainty arises from the conflict of the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them.

This Court, in referring to the purposes of Rule 56, U.R.C.P., stated in Dupler vs. Yates, 10 Ut.2d 251, 351 P.2d 624, (1959), at page 636:

> Rule 56, Utah Rules of Civil Procedure, is not intended to provide a substitute for the regular trial of cases in which there are disputed

> issues of fact upon which the outcome of the litigation depends. And it should be invoked with caution to the end, that litigants may be afforded the trial where there exists between them a bona fide dispute of material fact.

Subsequent to the Dupler case, supra, the Court in the case of Frederick May & Company, Inc. vs. Dunn, 13 Ut.2d 40, 368 P.2d 266, (1962), stated as follows:

> To sustain a Summary Judgment, the pleadings, evidence, Admissions, and inferences therefrom viewed most favorably to the loser, must show that there is no genuine issue of material fact, and that the winner is entitled to a Judgment as a matter of law. Such showing must preclude as a matter of law, all reasonable possibility that the loser would win if given a trial.

The Court heard evidence and read the record in the case of Gordon vs. Provo City, supra, and there it was determined that a water meter lid requires a special tool to remove same, and that it is not just a flat piece of metal sitting on the many sidewalk areas throughout the City that can readily be removed by any mischievous person; that the only evidence as to the lids are in the self-servicing Affidavits attached to the Motion for Summary Judgment by the supervisors of the Ogden City Water Works Department, (R-43,-57) which allege that the rings held the cover and fitted same. It is submitted to the Court, that if any minor, or any mischievous person, could readily remove a meter cover and that same was installed without any type

of special tool or bolting necessary for the removal of same, that it would be negligence per se and a public nuisance to the pedestrians or citizens of the City of Ogden who are compelled to walk upon the sidewalk areas, to be walking upon sidewalks containing water meter lids, which any mischievous person may remove so as to trap a pedestrian, who could have no knowledge of the condition of the lid, and particularly so as in the instant matter when traversing a sidewalk in the evening, and that, therefore, development of the evidence and facts as to the manner of securing the 22-inch wide water meter lids, is of utmost importance to the Trier of Facts in order to arrive at a Judgment of the negligence of the parties hereto.

## CONCLUSION

It is submitted to this Honorable Court, that the Appellant was not given the Court decreed opportunity for discovery and that the issues before the Court were issues, both of fact and law, that could not be adjudicated without sworn testimony and knowledge of the facts, and further, that as a matter of law, there is liability on either the municipality in its operation of a Water Works Department, in its proprietary capacity, or in that of the

abutter, who has made a use of the facility, or both, and that there cannot be a grant of absolute immunity to either or both of the Respondents making the pedestrian-citizen a self-insurer regardless of the facts and circumstances resulting in the injury to the pedestrian.

Respectfully submitted,

PETE N. VLAHOS of VLAHOS & KNOWLTON
Attorneys for Appellant

CERTIFICATE OF MAILING

A copy of the foregoing Brief of Appellant was posted in the U.S. mail postage prepaid and addressed to the Attorneys for the Respondents, Kim R. Wilson of Worsley, Snow & Christensen, Attorney for Ogden City, 7th Floor Continental Bank Building, Salt Lake City, Utah 84101, and to Leonard H. Russon of Hansen, Wadsworth & Russon, Attorney for The Standard Corporation, 702 Kearns Building, Salt Lake City, Utah 84101, on this 15 day of November, 1975.

Jeannine Stowell, Secretary