2009

Paul A. Wilkinson, Donna Wilkinson, Eldon D. East, and Sherene East v. Washington City : Reply Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS, STATE OF UTAH

PAUL A. WILKINSON, DONNA WILKINSON, ELDON D. EAST, and SHERENE EAST, Plaintiffs/Appellants, and STEVE and ALLISON WOODS Plaintiffs in Intervention and Appellants, vs. WASHINGTON CITY, and 10 unknown persons working for or under the authority of Washington City, Inc., and JOHN DOES I-XII, Defendants and Appellees.	REPLY BRIEF OF APPELLANT Appellate Case No. 20090114

Appeal from Final Judgment and Order of Judge Shumate of the Fifth Judicial District Court for Washington County, State of Utah.

Bryan J. Pattison(8766)
Jeffery N. Starkey(5415)
Durham Jones & Pinegar, P.C.
192 East 200 North, Third Floor
St. George, Utah 84770
Telephone: (435) 674-0400
Facsimile: (432) 628-1610
Attorney For Washington City

Justin D. Heideman (USB 8897)
Michael A. Parkes (USB 12196)
HEIDEMAN, MCKAY, HEUGLY & OLSEN, L.L.C.
2696 N. University Ave., Suite 180
Provo, Utah 84604
Telephone: 801-812-1000
Facsimile: (801) 374-1724
Attorneys for Defendant/Appellant

IN THE UTAH COURT OF APPEALS, STATE OF UTAH

PAUL A. WILKINSON, DONNA WILKINSON, ELDON D. EAST, and SHERENE EAST, Plaintiffs/Appellants, and STEVE and ALLISON WOODS Plaintiffs in Intervention and Appellants, vs. WASHINGTON CITY, and 10 unknown persons working for or under the authority of Washington City, Inc., and JOHN DOES I-XII, Defendants and Appellees.	**REPLY BRIEF OF APPELLANT** Appellate Case No. 20090114

Appeal from Final Judgment and Order of Judge Shumate of the Fifth Judicial District Court for Washington County, State of Utah.

Bryan J. Pattison(8766)
Jeffery N. Starkey(5415)
Durham Jones & Pinegar, P.C.
192 East 200 North, Third Floor
St. George, Utah 84770
Telephone: (435) 674-0400
Facsimile: (432) 628-1610
Attorney For Washington City

Justin D. Heideman (USB 8897)
Michael A. Parkes (USB 12196)
HEIDEMAN, MCKAY, HEUGLY & OLSEN, L.L.C.
2696 N. University Ave., Suite 180
Provo, Utah 84604
Telephone: 801-812-1000
Facsimile: (801) 374-1724
Attorneys for Defendant/Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

STATEMENT OF ISSUES & STANDARD OF REVIEW

Appellant submits this Reply Brief pursuant to Rule 24(c) of the Utah Rules of Appellate Procedure.

Issue Raised in Appellee's Brief: Does Washington City's decision to dramatically increase the water pressure in certain areas without providing notice to residents in those areas meet the standard for discretionary function immunity under § 63-30-10(1) (repealed 2004) of the Governmental Immunity Act?

Standard of Review: Correctness

A party's entitlement to discretionary function immunity under the Governmental Immunity Act is a question of law. *See Larev v Fairview City*, 57 P.3d 1007, 1013 (Utah 2002).

Questions of law are reviewed for correctness. *See Gordon v Maughan*, 204 P.3d 189, 191 (Utah App. 2009), *Ward v Richfield City*, 798 P.2d 757, 759 (Utah 1990), *Ron Case Roofing and Asphalt Paving, Inc. v Blomquist*, 773 P.2d 1382, 1385 (Utah 1989).

SUMMARY OF ARGUMENT

Simply stated, even if the Appellee's actions in installing new water lines are determined to be a fire fighting activity as Appellee claims, the Appellee's actions fall under the waiver to the Governmental Immunity Act contained in § 63-30-10(1) (repealed 2004), and do not meet the standard necessary for the City to demonstrate that its actions were excepted from that waiver by involving a discretionary function.

ARGUMENT

I. THE DISCRETIONARY FUNCTION EXCEPTION TO THE WAIVER OF GOVERNMENT IMMUNITY DOES NOT APPLY TO APPELLEE'S ACTIONS IN THE INSTANT MATTER

Application of the Governmental Immunity Act (Act) requires a three-step analysis.

Johnson v Utah Department of Transportation, 133 P.3d 402, 406 (Utah 2006). "First, we must decide if the Act affords immunity through its blanket immunization. *Laney*, 2002 UT 29, ¶ 11, 57 P.3d 1007.). Second, we must determine if the Act waives immunity given the particular circumstances of the case. *Id.* Third, we must consider if the governmental action qualifies for an exception to the waiver of immunity. *Id."*

A. Appellee's act is not immunized under the Government Immunity Act as it is included in the waiver of governmental immunity included in §63-30-10(1).

As a governmental act deliberated on by its officials, Wellington City's decision to install a new water line qualifies under the Governmental Immunity Act's blanket immunity. However, the act is excepted from that immunity by §63-30-10(1) as discussed in Appellant's Brief.

B. Appellee's act is not a discretionary function excepted from the waiver of governmental immunity because the act was an operational decision not involving a policy-making function.

Appellee contends that even if governmental immunity is waived under §63-30-10(1), it is excepted from that waiver by the immunity extended to those government actions that are discretionary functions. *(See Appellee Brief, pg. 17*[1]*)*

The Court held in *Nelson v. Salt Lake City* that "Discretionary immunity is a distinct, more limited form of immunity and should be applied only when a plaintiff is challenging a governmental decision that involves a basic policy-making function."[2]

Further, the Court reads discretionary function exceptions to the limited liability waiver narrowly,[3] and government actors claiming such immunity "must make a showing that a

---

[1] While Appellee actually cites to §63-10-10(1). Appellant presumes for purposes of this Reply Brief that citation to that code section was a simple typographical error, and Appellee intended to cite to §63-30-10(1) as §63-10-10 has been repealed since 1981 and did not deal with discretionary function immunity.)

[2] *Nelson v. Salt Lake City*, 919 P.2d 568, 575 (Utah 1996)

[3] *Johnson v. Utah Department of Transportation,* 133 P.3d 402, 406 (Utah 2006)(stating, "This Court has always read the discretionary function exception to the limited liability waiver narrowly. To do so otherwise would allow the exception to swallow the rule."). (citing *Nelson v. Salt Lake City*, 919 P.2d 568, 575 (Utah 1996))

conscious balancing of risks and advantages took place."[4] With the key being, that "government actually exercises a level of discretion in a manner that implicates policy-making and thrusts the decision into the political process." *Johnson v. Utah Department of Transportation,* 133 P.3d 402, 407 (Utah 2006).

However, as demonstrated by numerous cases[5], the Court has determined that discretionary function governmental immunity does not extend governmental immunity to operational decisions that are the "ministerial implementation"[6] of a policy decision.

In Appellee's Brief, Appellee compels the Court to accept its rationale that the installation of a new water line is necessarily a fire-fighting function, and that the department engaged in "department wide consideration, evaluation, and weighing of policies that entitle a municipality to discretionary function immunity" in making the decision to install a new water line to increase water pressure in higher elevations. *(See Appellee Brief, pg. 17)*

In the instant matter, even if Appellant were to accept that the Appellee engaged in a balancing decision to determine the necessity of increasing water pressure to higher elevations, Appellee has failed to demonstrate that it engaged in a similar deliberative process to determine the **method** by which that objective was to be accomplished nor did it undertake to determine whether or not residents in effected areas should be **notified** of their decision and the actions resulting therefrom.

C. Appellee had a duty to provide adequate notice to Appellants and failed to do so.

---

[4] *Little v Utah State Division of Family Services,* 667 P.2d 49, 51 (Utah 1983)

[5] *Carroll v State of Utah by and Through its Road Commission,* 27 Utah 2d 384, 496 P.2d 888 (Utah 1972) , *Little v Utah State Division of Family Services,* 667 P.2d 49 (Utah 1983) , *Johnson v Utah Dept. of Transp.,* 133 P.3d 402 (Utah 2006) , *Nelson v Salt Lake City,* 919 P.2d 568 (Utah 1996) , *Laney v Fairview City,* 57 P.3d 1007 (Utah 2002)

[6] *Carroll v State of Utah by and Through its Road Commission,* 27 Utah 2d 384, 389; 496 P.2d 888, 892 (Utah 1972)

In its brief, Appellee contends that "[I]f the Court does not interpret subsection (18)(b) to shield the City from liability under the facts of this case, it has effectively ruled that the City should have done nothing, and waited instead to find its immunity on the scene of an inferno as water trickles from the hose while property is engulfed in flames and lives are in danger?" While Appellee's statement indeed paints a vivid picture of the potential consequence of failing to provide adequate fire department protection, Appellee completely ignores the damage already done to Appellants' property by Appellee's actions—damage which likely could have been avoided had Appellee simply given Appellants adequate notice of their intentions. Further, Appellant posits, how is it any less dangerous to public safety to have a homeowner's plumbing explode from excessive pressure than to have it burn from a lack of it?

In *Carroll v. State,* the Court determined that discretionary function immunity did not apply to the State in an automobile accident caused by the decision of a road supervisor to use a particular form of barrier and a failure to warn drivers of the upcoming road impairment, which were deemed operational level decisions. In a concurring statement, Judge J. Crockett wrote "In this case there was no place for discretion to give or not to give an adequate warning to the motoring public. The duty on the part of the State to give and maintain a reasonably adequate warning was absolute."[7]

A similar rationale should be following in the instant matter. The Appellee had a duty to warn residents, and they failed to do so.

CONCLUSION

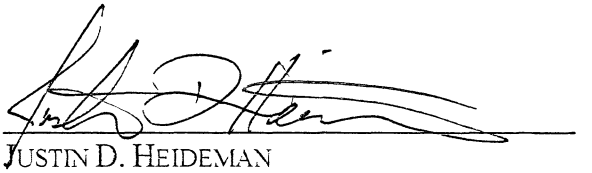
For the foregoing reasons and those contained in Appellant's Brief, this Court should

//

[7] *Carroll v State of Utah by and Through its Road Commission,* 27 Utah 2d 384, 391; 496 P.2d 888, 893 (Utah 1972)

reverse the District Court's decision to grant the Appellee summary judgment.

Respectfully submitted this 14th day of December, 2009.



JUSTIN D. HEIDEMAN
HEIDEMAN, MCKAY, HEUGLY, & OLSEN, LLC
Attorney for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 14th day of December, 2009, a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF was served on the following:

Bryan J. Pattison/Jeffrey N. Starkey
Durham Jones & Pinegar, PC
192 East 200 North, Third Floor
St. George, UT 84770
Fax: 435-628-1610

Service made by:

X First Class US Mail, postage prepaid

X Facsimile

_____ Hand delivery

HEIDEMAN, MCKAY, HEUGLY, & OLSEN, L. L. C.

Annette Smith
Legal Assistant