

1988

William and Judy McCleery v. Landforms Construction Corporation : Reply Brief

Utah Supreme Court

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BRIEF

880401

IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM & JUDY McCLEERY, et al.,)	
)	
Plaintiffs,)	
)	Case No. 880401
v.)	
)	
LANDFORMS CONSTRUCTION CORP., et al.,)	
)	
Defendants.)	

LANDFORMS CONSTRUCTION CORP.; LANDFORMS)	
DEVELOPMENT INC.; MARK S. SANDBERG;)	
L. WAYNE REDD; LYLE A. HALE; HALE/REDD)	
INVESTMENT GROUP, a general partnership,)	
a/k/a REDD HALE INVESTMENT GROUP; and)	
HALE/REDD LAND INVESTMENT, a joint venture,)	
)	
Third-Party Plaintiffs)	
and Appellants,)	
)	
v.)	
)	
BOUNTIFUL CITY and DAVIS COUNTY,)	
)	
Third-Party Defendants)	
and Respondents.)	

REPLY BRIEF OF APPELLANTS

Appeal from the Judgment of the Second Judicial District Court,
Davis County, State of Utah, Honorable Rodney S. Page Presiding

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ARGUMENT

POINT I.

BOUNTIFUL CITY'S AND DAVIS COUNTY'S ACTIONS DID NOT INVOLVE THE MANAGEMENT OF FLOOD WATERS OR THE CONSTRUCTION, REPAIR AND OPERATION OF A FLOOD AND STORM SYSTEM.

A. Bountiful City.

1. Roadway.

The main thrust of Point I in Bountiful City's brief is an argument that the decision to require construction of the access road in one phase rather than three phases is an action involving the management of flood waters or the construction, repair, and operation of flood and storm systems. Bountiful City relies on the affidavits of Jack P. Balling, which state inter alia:

4. One of the purposes of streets and the purposes of curbs, gutters, inlet boxes storm drain lines and storm detention basins are for the collection and management of storm waters. (Affidavit) (Respondent Bountiful City's Brief, p. 15.)

This is Bountiful City's sole support for its proposition that the decision to require the construction of the street in one phase rather than three constituted a flood control decision. Such an interpretation is untenable.

It is not the purpose of Utah Code Ann. §63-30-3 to grant immunity to any city activity which impacts peripherally on flooding. If one accepts Bountiful City's position, any activity of the City concerning road construction would be granted immunity because it would impact slightly on flood

control. This was clearly not the intent of the legislature. It is obvious that the primary purpose of a road is to provide for the movement of vehicular traffic, not flood control. Jack Balling, in his deposition, states that the reason why Bountiful City required construction in one phase rather than three was to provide access to the development. The decision was not a flood control decision.

Q. What was the purpose for having the road be completed all at one time? Why was it required that the road be put in connecting Bountiful Boulevard and Monarch Drive?

A. That was in the ordinance. This property lies within the boundary of what is called the foothill ordinance, and in order to develop it, it had to have two accesses.
(Jack Balling Depo. p. 85.)

Jack Balling then testified that the road was constructed for the purpose of providing serviceability to the subdivision, not flood control.

Q. Do you know what the purpose is behind the ordinance requiring two accesses? Or what is your understanding of the reason for that?

A. Well, I think the understanding of the reason is so that, you know, you have accessibilities for emergency vehicles, fire, police, for the serviceability to the lots that are in the area, without having one way that could be obstructed and then there not being any access into that development. And we're looking at a long, big development. The maximum length of any private dead-end street is 600 feet under our ordinance. When you have an area longer than that, then it has to have two accesses from both ends. And particularly in the foothill ordinance. It's specified in the

ordinance that you have to have access
from two different locations.
(Jack Balling Depo. pp. 88-9.)

It is well settled Utah law that deposition testimony cannot be contradicted by a subsequent affidavit for purposes of summary judgment. Guardian State Bank v. Humpherys, 762 P.2d 1084, 1087 (Utah 1988); Webster v. Sill, 675 P.2d 1170, 1172-73 (Utah 1983). In the instant case, Bountiful City attempts to use the affidavit of Jack Balling in a manner that contradicts his express deposition testimony. Jack Balling, in his deposition, states that the reason the road was required to be constructed in one phase was to provide access to the Bridlewood project. The fact that a subsequent affidavit states a different reason clearly illustrates that there is a genuine issue of material fact regarding the purpose of the requirement.

Additionally, on page 15 of its brief, Bountiful City attributes to the lower court a statement which is clearly not included in the court's ruling. The trial judge in granting the motion for summary judgment never stated that it was quite evident that the acts complained of in plaintiffs' First Amended Complaint and the Amended Third-Party Complaint were in the management of flood waters or in the construction, repair and operation of flood and storm systems and involved acts or the failure to act to do the acts of planning, designing, constructing repairing and operating or managing flood waters. The alleged statement by the court is nowhere to be found in the record.

It should also be noted that the requirement that the road be completed in a single phase was imposed prior to the

development of a regional detention basin. In other words, even if one were to assume that the access road was part of a flood control system, the water collected from the road had nowhere to go. There was no destination point for the water to collect. It is totally illogical to argue that it was a flood control decision to put the road in all at once without showing that there was someplace for the water to go.

2. Absolute Immunity.

Bountiful City also argues that §63-30-3 grants a governmental entity absolute rather than qualified immunity in regard to the management of flood waters and the construction, repair and operation of flood and storm systems. Bountiful's argument is premised on the fact that the flood control language is contained in a separate paragraph.

It is incongruous to accept Bountiful City's argument for a potentially limitless construction of the phrases "management of flood waters" and "construction, repair and operation of flood and storm systems" and also accept the City's argument that this immunity is absolute and not subject to the waiver provisions of the Act. If absolute immunity was intended, the legislature would have termed it absolute immunity rather than a governmental function which in the preceding paragraph of the same code section it defines as being subject to certain enumerated waivers.

Additionally, the Governmental Immunity Act does not grant any activity absolute immunity. All immunity bestowed by the Act pursuant to classification as a governmental function is

a qualified immunity. If the legislature had intended such a radical departure from existing statutory law, it would not have merely tacked the amendment onto the existing language contained in §63-30-3. Rather, the legislature would obviously have enacted a new and separate provision explicitly conferring absolute immunity on certain governmental activities and functions. Because the amendment is made to a pre-existing provision, the surviving language, terms and definitions of that provision clearly apply to the amendment.

The foregoing principle of statutory construction is well supported by existing Utah case law. See Gleave v. Denver and Rio Grande Western Railroad, 749 P.2d 660, 672 (Utah App. 1988), "[The court must] assume that each term in the statute was used advisedly"; Jensen v. Intermountain Health Care Inc., 679 P.2d 903, 906 (Utah 1984), "The best evidence of the true intent and purpose of the Legislature in enacting the Act is the plain language of the Act. The meaning of a part of an act should harmonize with the purpose of the whole act. Separate parts of an act should not be construed in isolation from the rest of the act"; Osuala v. Aetna Life and Cas., 608 P.2d 242, 243 (Utah 1980), "There are some cardinal rules of statutory construction to be considered in relation to this controversy. If there is doubt or uncertainty as to the meaning or application of the provisions of an act, it is appropriate to analyze the act in its entirety, in light of its objective, and to harmonize its provision in accordance with the legislative intent and purpose"; Great Salt Lake Authority v. Island

Ranching Co., 18 Utah 2d 45, 414 P.2d 963, 964 (1966), "It is a cardinal rule of statutory construction that all parts of the enactment should be considered together so as to produce a harmonious whole and to give effect to the intent and purpose to be divined from the entire act."

Bountiful City has taken the position that the decision to construct the road in one phase was a flood control decision because a road has a peripheral relationship to a flood/storm system. Bountiful City then argues that its immunity for this decision is absolute, not qualified. The adoption of Bountiful City's position would allow every City decision relating to a road to be shielded by absolute immunity. The fallacy of this interpretation is illustrated by the very existence of §63-30-8 which waives governmental immunity for the defective condition of a road. Section 63-30-8 provides:

Immunity from suit of all governmental entities is waived for any injury caused by a defective, unsafe, or dangerous condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct or other structure located thereon.

The existence of this specific waiver provision and the argument that a road is part of a storm system with decisions concerning the road being shielded by absolute immunity are simply incompatible. The legislature surely did not intend to grant an activity absolute immunity in one provision and then proceed to waive that immunity in a subsequent provision. To render these provisions compatible either decisions concerning road construction are not covered by the second paragraph of

§63-30-3, or the immunity bestowed in the second paragraph of §63-30-3 is qualified rather than absolute. In either case, the trial court's entry of summary judgment in favor of Bountiful City is not supported by law and must be reversed.

B. Davis County.

In addressing the §63-30-3 argument, Davis County divides its response into two distinct areas. First, Davis County argues that it had no involvement in the decision to require the construction of an access road. Second, Davis County apparently admits that it delayed in getting the regional detention basin on line, but asserts that it is immune from liability pursuant to Utah Code Ann. §63-30-3.

1. Roadway.

Davis County attempts to claim that it had no involvement or control in respect to decisions involving the access road. Although Bountiful City may technically have had formal control over the road issue, it is obvious that an informal or tacit agreement existed between Bountiful City and Davis County which granted Davis County substantial control in these types of decisions. This conclusion is supported by ample evidence.

For example, when the Bountiful City council granted preliminary approval for the Bridlewood Subdivision, the planning commission recommended that preliminary approval be granted subject to the following conditions:

. . . (6) Developer to provide on-site storm detention facilities to the satisfaction of Bountiful City, Davis County and adjacent

property owners . . . (Emphasis added)
(Exhibit 90; Brief of Respondent Bountiful
City, Statement of Fact No. 2.)

It is thus apparent that from the inception of the Bridlewood Project, Davis County had a substantial, albeit possibly unofficial, role in relation to activities involving the Bridlewood Project.

Davis County's involvement in the access road issue is aptly illustrated by the following deposition testimony from its own representative Sid Smith and the letter to which this testimony refers.

Q. Let me show you what has been marked as Exhibit 98, and once again, I did not see this as part of Commissioner Tippetts' file, but it is a letter written by Commissioner Tippetts to Douglas Todd of the Planning Commission of Bountiful City and the letter is dated May 30, 1985. Can you just glance over that and let me know if you've ever seen it before?

A. I believe the first time I saw it was at Mark Sandberg's deposition. I don't believe I saw it before then.

Q. Did you ever have any conversation with Commissioner Tippetts about the contents of this letter?

A. Not that I recall. Could I look at it a little more fully? I don't recall it and most likely would not have discussed it, because it strictly involved the roads and I had no involvement in the roads whatsoever at the time. (Emphasis added)

Q. Based upon your experience in working with Davis County in capacities that you have worked, did you have an opinion as to why Commissioner Tippetts is apparently injecting himself into the design of the roadway and why he's talking with Bountiful City about that? (Emphasis added)

- A. Most likely he had a concern for the unincorporated part of the county and the overall traffic flow of the area. (Emphasis added)
(Sid Smith Depo. pp. 105-106.)

The letter which this deposition testimony refers to was written by a Davis County commissioner to the Bountiful City planning commission. Courtesy copies were also sent to John Booth, Bountiful Planning Director, and Jack Balling, Bountiful City Engineer, as well as other officials of Davis County. The letter states in pertinent part:

It has come to our attention that the Bridlewood Subdivision has been scheduled for some approvals at your June 14 Planning Commission meeting. We are a bit concerned in that it would appear that flood control and street circulation considerations have not been adequately addressed. . . . Both the road circulation and flood considerations are critical.

If approvals are contemplated for this subdivision on June 4, may I respectfully request that they be held in abeyance in order for Bountiful City representatives, North Salt Lake City representatives, and appropriate individuals from Davis County to have an opportunity to further evaluate the requirements for a properly aligned road and for addressing the flood control considerations. Your cooperation and that of the Planning Commission is respectfully requested. (R. 350-51; Exhibit 98)

It is quite evident that Davis County did in fact exercise control over decisions respecting the Bridlewood development or, in the very least, expected to be consulted with and grant approval before any major decisions concerning the Bridlewood project were undertaken.

Other deposition testimony also supports the above-stated conclusions. For example, Mark Sandberg, one of the developers' representatives, testified:

Q. Who on behalf of your company studied erosion control after or prior to the time you made these cuts for the road in late 1985?

A. Well, I don't understand the question.

Q. Well, let me ask the question. Did anyone, you or anyone from your company, study the impact of cutting those roads?

A. No, but we relied on the professional services of the Consortium. They were the engineers for Bridlewood; they were the professionals. We also relied on the professional input of Bountiful City and to a lesser extent, Davis County.

(Emphasis added) (Mark Sandberg Depo. p. 83.)

Clark Jenkins, another representative of the developers, testified:

Q. The development company agreed to make sure it was passed by Davis County and approved? What do you mean, stipulation of whom?

A. I don't know if stipulation is the right word, but anyway when we were annexed, there was a dispute or an objection I guess from North Salt Lake. And one of the problems was storm. And so when we got it annexed, it was agreed that both Davis County and North Salt Lake would look at our plans and make sure it met their standards as well as Bountiful City. They also put a restriction on us that, if I remember, and this is off my mind, I think we were allowed--we had to retain water and only be able to release like 2 cfs, if I am not mistaken.

(Clark Jenkins Depo. p. 101.)

Q. Yes. In other words, Bountiful was saying "Until we have Davis County and North Salt Lake satisfied, we're not going to approve it"?

A. That's right.

(Clark Jenkins Depo. p. 102.)

From the foregoing, it is clear that a substantial material fact issue exists concerning the control exercised by Davis

County over the Bridlewood project. When such a genuine issue of material fact exists, the granting of summary judgment is clearly not appropriate. Therefore, the trial court's entry of judgment in favor of Davis County should be reversed.

2. Delay.

Davis County argues that it is not liable for damage occasioned by its delay in getting regional detention basin on line, because governmental immunity applies not only to the exercise of a governmental function, but also to the failure or omission to exercise a governmental function. In support of this proposition, Davis County cites the case of Madsen v. Borthick, 658 P.2d 627 (Utah 1983). In Madsen, the failure or omission to act which was shielded by governmental immunity concerned the defendant's alleged failure to exercise a statutory duty in supervising banks. This is far different from the situation presented here. In this case, the evidence is not simply that Davis County merely failed to act. Rather, Davis County acted improperly in several respects such as injecting itself into the roadway construction issue, making promises it did not keep, and foreclosing developers from constructing their own detention basin. Madsen clearly does not apply to these actions.

Additionally, Madsen is further distinguishable because it involved the failure of a state official to comply with an affirmative statutory duty. In other words, he was required by statute to act. "The commissioner and his department have the duty (under the statutory law appurtenant to this controversy)

of supervising banks, including examining resources and management annually . . ." Madsen v. Borthick, 658 P.2d at 628, n. 2. The instant case does not involve a mandated duty which must be performed by a governmental official.

POINT II.

EVEN IF BOUNTIFUL CITY'S AND DAVIS COUNTY'S
ACTIVITIES ARE TERMED GOVERNMENTAL FUNCTIONS,
THE STATUTORY WAIVERS REMAIN APPLICABLE.

A. Bountiful City.

1. Pleadings Sufficient.

Even if the court concludes that Bountiful City's and Davis County's activities and decisions constituted governmental functions, this does not end the inquiry. The Governmental Immunity Act specifically provides for waivers of said immunity in certain circumstances. In its brief, Bountiful City argues that appellants are foreclosed from arguing a waiver under §§63-30-8 and 63-30-9 because said waivers were not alleged in plaintiffs' First Amended Complaint and in Landforms' Amended Third-Party Complaint. Bountiful City's position is without merit for several reasons.

First, essential facts were alleged in the pleadings. A reading of the Amended Third-Party Complaint makes this clear.

Second, Bountiful City's claim ignores the fact that this is not a motion to dismiss and this Court is obligated to look beyond the face of the pleadings and decide this case based upon the facts with all questions and all inferences resolved in favor of third-party plaintiffs.

Summary judgment is proper only if the pleadings,

depositions, affidavits and omissions show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. If there is any doubt or uncertainty concerning questions of fact, the doubt should be resolved in favor of the opposing party. Thus, the court must evaluate all evidence and all reasonable inferences fairly drawn from the evidence in a light most favorable to the party opposing summary judgment. Frisbee v. K & K Constr. Co., 676 P.2d 387, 389 (Utah 1984).

Third, the City's argument ignores the axiomatic concept of notice pleading. Every fact need not be set forth in the pleadings. It would be a strange pleading indeed that first affirmatively alleged defendant was entitled to government immunity and then alleged why certain waivers or other reasons made that very immunity inapplicable.

Fourth, Bountiful's argument also ignores the fact that the statutory waivers and all facts pertaining to this matter were argued and briefed pursuant to the summary judgment hearing. (Record pp. 234-235, 384.) Both sides argued the meaning of the waiver provisions in the trial court. No one at the trial court level argued about any so called defects in the pleadings. Certainly, a claim that the pleadings are insufficient is misplaced and cannot be argued for the first time on appeal. See Verret v. Deharpport, 621 P.2d 598, 603 (Or.App. 1980), "It is well settled that a party may not raise the inadequacy of pleadings for the first time on appeal."

2. Bountiful's Actions Were Not Purely Discretionary.

Bountiful City additionally argues that §63-30-10, which provides for the waiver of immunity for injury caused by the negligent act or omission of an employee does not apply because the decision of whether to construct a regional detention basin or not and the decision of whether to have a road put in fully or in phases are discretionary functions.

This Court has noted that virtually all acts require the exercise of some degree of discretion and that the "statutory exception should be thus confined to those decisions and acts occurring at the 'basic policy making level,' and not extended to those acts and decisions taking place at the operational level, or in other words, 'those which concern routine, everyday matters, not requiring evaluation of broad policy factors.'" Gleave v. Denver and Rio Grande Western R.R., 749 P.2d 660, 669 (Utah App. 1988), quoting Frank v. State, 613 P.2d 517, 520 (Utah 1980).

Bountiful City cites Gleave as authority for the adoption of the following factors to be utilized in distinguishing between functions at the policy making level from those at the operational level. In order for an act to be purely discretionary, one must answer affirmatively to all of the following four preliminary questions.

- (1) Does the challenged act, omission, or decision necessarily involve the basic governmental policy, program, or objective?
- (2) Is the questioned act, omission, or decision essential to the realization or

accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy program, or objective?

(3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?

(4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

Gleave, 749 P.2d at 668, quoting Little v. Utah State Div. of Family Services, 667 P.2d 49, 51 (Utah 1983).

Bountiful then argues that its activities at issue were purely discretionary because they satisfied the preceding four factors. This argument is fallacious because the City's actions did not require an affirmative answer to all of the preceding four questions.

First, the challenged acts, requiring a road to be built in one phase rather than three phases and the foreclosing of the option to build an on-site detention basin, did not involve basic governmental policies, programs or objectives. Bountiful City argues that a "coherent, workable street plan is a policy of the city." Even if this is true, it begs the issue. Clearly, the requirement that the road in question be constructed in one phase rather than three was not a basic governmental policy, program or objective. Additionally, Bountiful argues that "A flood control system utilizing streets and detention basins is a governmental program and objective." Again, this does not satisfy the test. As evidenced by Jack

Balling's deposition testimony, the roadway in this case was not a flood control component.

Second, one must analyze whether the decision was essential to the realization or accomplishment of the policy as opposed to one which would not change the course or direction of the policy. Clearly, the requirement that the road be constructed in one phase rather than three would not change the course or direction of the City's street plan policy. The street plan policy of the City represents a decision on where to locate specific streets and highways. It does not involve a policy as to whether a street or highway should be constructed in one rather than three phases. Additionally, the requirement that the developers tie into a non-existent regional detention basin, as opposed to constructing their own on-site facilities, was not a decision which would change the course or direction of the City's flood control policy.

Third, the decision concerning the street and the regional detention basin was not an exercise of basic policy evaluation and judgment. These were unnecessary requirements imposed upon the developers by the City and County for no sound reasons. These decisions resulted in the plaintiffs' injury and the landowners and developers should not be held liable for these decisions.

Fourth, Bountiful City argues that its actions were fully authorized by lawful authority. Bountiful cites statutory provisions illustrating that it had the authority to lay out streets and improve subdivisions. Even assuming this to be true,

these sections do not give the City express authority to require the construction of a road in a single phase rather than three phases. Also, Bountiful argues that the plan of a regional detention basin is pursuant to a countywide flood control system authorized by a Davis County ordinance. Again, even if one assumed this to be true, it does not excuse the delay in getting such a system on line which was the proximate cause of the plaintiffs' injuries. If the developer had been allowed to construct an on-site basin as it was initially led to believe it could, the injuries would not have resulted.

Because Bountiful's actions do not meet all four requirements as set forth in Gleave, the actions are not purely discretionary in nature and the immunity is therefore waived under §63-30-10.

3. Meaning of Utah Code Ann. §63-30-10.5 (1988)

Bountiful City also argues that §63-30-10.5 of the Governmental Immunity Act is unavailable to the developers for two reasons, namely, that the statute cannot be applied retroactively, and that the statute does not apply to suits sounding in tort or negligence. In so arguing, Bountiful completely misses the point of the landowners' and developers' position in respect to §63-30-10.5.

Third-party plaintiffs in their initial brief argue that the legislature recognized the apparent conflict between §63-30-3 and Article I, §22 of the Utah Constitution, and specifically enacted Utah Code Ann. §63-30-10.5 to remedy the situation. Article I, §22 of the Utah Constitution states,

"Private property shall not be taken or damaged for a public use without just compensation." Section 63-30-10.5 states:

- (1) Immunity from suit of all governmental entities is waived for the recovery of compensation from the governmental entity when the governmental entity has taken or damaged private property without just compensation.

The language employed in both these provisions is strikingly similar. Clearly, the waiver contained in Utah Code Ann. §63-30-10.5 makes Utah Code Ann. §63-30-3 inapplicable in circumstances which would be in conflict with Article I, §22 of the Utah Constitution.

Third-party plaintiffs discussed the matter in their initial brief to illustrate that the only logical interpretation of §63-30-3 is that the immunity bestowed is qualified rather than absolute. If one concludes that absolute immunity was intended, it would place the statute and the constitutional provision hopelessly in conflict. If the immunity provision was termed absolute, the waiver provision could not operate to save the Governmental Immunity Act from constitutional attack. Third-party plaintiffs are not asserting that §63-30-10.5 should be applied retroactively. Rather the enactment of §63-30-10.5 illustrates that all of the activities listed under §63-30-3 and classified as governmental functions are accorded qualified rather than absolute immunity.

Bountiful City states that it is clear that the activities covered under §63-30-10.5 are meant to cover only those takings or damages occurring pursuant to the exercise of

the sovereign power of eminent domain. How Bountiful City came to this conclusion when the statute and case law are silent on the point is unclear. The cases cited by Bountiful City, Springville Banking Co. v. Burton, 10 Utah 2d 100, 349 P.2d 157 (1960), and Fairclough v. Salt Lake County, 10 Utah 2d 417, 354 P.2d 105 (1960), obviously do not apply to the 1987 statute. Additionally, the cases do not purport to apply the predecessor statute. Therefore, Bountiful City's argument concerning retroactivity is misplaced, and its reliance on 1960 cases to construe a 1987 statute obviously does not merit consideration.

B. Davis County.

Davis County does not argue any of these issues and apparently does not dispute third-party plaintiffs' position on these issues.

POINT III.

THE UTAH GOVERNMENTAL IMMUNITY ACT IS NOT
CONSISTENT WITH ARTICLE 1, §22 OF THE UTAH
CONSTITUTION.

A. Bountiful City.

Bountiful City argues in its brief that the Utah Supreme Court's position is that the constitutional guarantees afforded by Article I Section 22 may not be realized by citizens of the state because the legislature has failed to enact enabling legislation.

The wisdom of Bountiful's position is highly suspect. The court would not purport to grant every citizen of Utah basic property rights and leave the same citizens powerless to enforce them. Clearly, such a result would be unfair and unjust.

Bountiful not only fails to address the fundamental policy questions at issue with respect to Article I Section 22, but it also fails to discuss or distinguish the cases cited by third-party plaintiffs at pages 36 and 37 of their initial brief. These cases hold that Article I Section 22 is indeed self-executing. Significantly, Judge Greene, who just three years ago analyzed this issue, so held. Katsos v. Salt Lake City Corp., 634 F.Supp. 100 (D. Utah 1986).

Third-party plaintiffs admit there is a split of authority regarding whether or not Article I Section 22 is self-executing. However, it is submitted that the better reasoned cases reached a just result, namely, Article I Section 22 is self-executing and citizens who are promised basic property rights under the Constitution are entitled to avail themselves of their promised rights.

B. Davis County.

Davis County completely missed the point of third-party plaintiffs' argument that Utah Code Ann. §63-30-3 is unconstitutional in light of Article I, §22 of the Utah Constitution. Davis County argues that 63-30-10.5 of the Governmental Immunity Act is consistent with Article I, §22 and therefore the Governmental Immunity Act is not in conflict with an express constitutional provision.

To make such an argument, Davis County must concede that the immunity bestowed by §63-30-3 involving "flood damages" is qualified rather than absolute. If the immunity was absolute, §63-30-10.5 would not operate to save the Governmental Immunity

Act from constitutional attack which Davis County argues occurs.

Third-party plaintiffs agree with Davis County that the immunity bestowed by §63-30-3 is qualified rather than absolute. However, if the Court construes §63-30-3 as creating an absolute immunity, it should also declare the statute unconstitutional because it would then clearly be in direct conflict with Article I Section 22 of the Utah Constitution.

POINT IV.

THE UTAH COMPARATIVE FAULT ACT REQUIRES
THE INCLUSION OF ALL PARTIES ON A SPECIAL
VERDICT FORM EVEN IF THEY CANNOT BE
FORMALLY JOINED AS PARTIES IN THE ACTION.

A. Bountiful City.

The Utah Comparative Fault Act requires the fault of all parties to an occurrence to be compared at trial in order for the fault of the respective parties to be accurately apportioned. Utah Code Ann. §§78-27-38 and 78-27-40 illustrate that no defendant should be held liable for any amount in excess of the proportion of fault actually attributable to that defendant. If Bountiful City and Davis County are not included on the special verdict form, it is obvious that the landowners and developers will be assessed a damage award that is in excess of the proportion of fault actually attributable to them.

The Utah Supreme Court had an opportunity to consider the propriety of apportioning fault under the Utah Comparative Negligence Act to a non-party in Godesky v. Provo City Corp., 690 P.2d 541 (Utah 1984). The case involved a personal injury action brought by a roofer who was injured when he came into

contact with an electrical wire. The plaintiff was employed by Pride Roofing Company (Pride). Pride was dismissed prior to trial presumably due to the exclusivity of the workmen's compensation remedy. In other words, Pride was immune from further liability.

The case went to the jury which found Provo City Corporation, the owner of the electrical wire, 70% negligent. The jury also found Monticello Investors, the owner of the building, 20% negligent. The jury also assessed 10% of the fault to Pride, which was not a party to the action. The case was appealed to the Utah Supreme Court which affirmed the decision in all respects. In commenting upon the correctness of the jury's verdict, the court stated:

This is precisely what the jury did in this case. It compared the negligence of Provo, Monticello, and Pride and determined that each actor's negligence concurred to cause plaintiff's injury and that Pride's 10% negligence did not supersede Provo's 70% negligence as a matter of fact. Id. at 545.

The fact scenario in Godesky is analogous to the instant case. Pride was presumably dismissed prior to trial due to its immunity under Workmen's Compensation. Even though Pride was not a party to the action, the trial court had the jury apportion its negligence on the special verdict form because Pride's activities contributed to the injury. This decision was confirmed on appeal by the Utah Supreme Court. In the instant case, assuming arguendo that Bountiful City and Davis County are held to be immune, the jury must still have the opportunity to assess the proportion of fault attributable to

them just as the jury in the Godesky case did with Pride.

In its brief, Bountiful City does not contest this point but merely asserts that the Utah Comparative Fault Act does not require the City to be a formal party to this lawsuit in order for the jury to determine the City's comparative fault. Interestingly, the cases relied upon by the City are those included in third-party plaintiffs' brief. They all stand for the proposition that the jury must have the opportunity to consider the negligence of all parties whether or not they be parties to the lawsuit. Third-party plaintiffs agree with the reasoning employed by the cases cited in Bountiful's brief, but contend that both the City and County should remain as a named defendant in this action in order for the jury to hear all probative evidence and accurately assess the percentage of fault attributable to Davis County and Bountiful City.

It is clear from the case law and treatises which have been cited by both developers, landowners and Bountiful City that to effectuate the principles of comparative negligence, all parties contributing to the occurrence must have their fault assessed on the special verdict form. This is true whether or not they could ultimately be held liable to the plaintiff in damages.

More importantly, however, in determining comparative responsibility or comparative causation it is not necessary to establish that all persons included on the verdict form would be liable for some or all of the damages attributable to their conduct or their product. Indeed, in many instances, it will not be possible to establish

liability for various reasons including immunity, failure to join as a party, unknown identity, statute of limitations, or numerous other possible causes. In determining whether not to include additional parties on the verdict form, the question is not whether a judgment would or could be rendered against that person, but whether or not his conduct or his product caused or contributed to the action and injuries. Vannoy v. Uniroyal Tire Co., 726 P.2d 648, 655-56 (Idaho 1985).

Even if Bountiful City and Davis County are held to be immune from a damage award in this case, it is clear that their fault must be assessed by the jury to insure that a just result is reached as was done in the Godesky case. The purpose of governmental immunity is to protect a government from damage awards, not to shift liability to third parties. The landowners and developers must not be saddled with more liability than that which is actually attributable to them. If the governmental entity is immune for its conduct, then that immunity impacts identically on plaintiffs and defendants. It represents liability/damages that are uncollectible. It does not mean that a co-defendant, who is not a governmental entity and is therefore not immune, has to assume liability for the government's actions. This is joint and several liability. Joint and several liability has been abolished in Utah.

B. Davis County.

Davis County does not argue the comparative fault issue and therefore apparently acquiesces in the position of the landowners and developers on this point.

CONCLUSION

For the foregoing reasons, as well as all other reasons, specified by third-party plaintiffs in their initial brief, it is respectfully submitted that the trial court's summary judgment in favor of Bountiful City and Davis County should be reversed and this matter should be remanded for trial against all named parties, including Bountiful City and Davis County.

DATED this 30 day of May, 1989.

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CERTIFICATE OF MAILING

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four true and correct copies of the foregoing brief were mailed,
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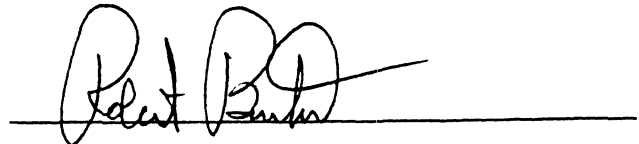
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