

1988

William and Judy McCleery, et al. v. Landforms Construction Corp., et al. : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Melvin C. Wilson; Davis county attorney; Gerald E. Hess; Chief Civil Deputy; Layne B. Forbes; Bountiful City Attorney; Attorneys for third Party Defendants.

Robert A. Burton; Strong and Hanni; Attorneys for Landforms Construction Group; Lowell V. Smith; Hanson, Epperson, and Smith; Attorneys for Third Party Plaintiffs.

Recommended Citation

Brief of Respondent, *McCleery v. Landforms Construction Corp.*, No. 880401.00 (Utah Supreme Court, 1988).
https://digitalcommons.law.byu.edu/byu_sc1/2353

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

BRIEF

5.9

.9

CKET NO.

880401

IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM & JUDY McCLEERY, et al.,	:	
Plaintiffs,	:	
v.	:	Case No. 880401
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	:	
Respondents.	:	

BRIEF OF RESPONDENT BOUNTIFUL CITY

Honorable Rodney S. Page, District Judge, Second Judicial District, Davis County, State of Utah.

ROBERT A. BURTON, 516
STRONG & HANNI
Attorneys for Landforms
Construction Group, Landforms
Development, Inc.
Sixth Floor Boston Building
Salt Lake City, Utah 84111

LOWELL V. SMITH, 3006
HANSON, EPPERSON & SMITH
Attorneys for Mark S. Sandberg,
L. Wayne Redd, Lyle A. Hale,
Hale/Redd Investment Group, and
Hale/Redd Land Investment
175 South West Temple, Suite 650
Salt Lake City, Utah 84101

LAYNE B. FORBES
Attorney for Bountiful City
790 South 100 East
Bountiful, Utah 84010

MELVIN C. WILSON
Davis County Attorney
GERALD E. HESS
Chief Civil Deputy
Davis County Courthouse
P. O. Box 618
Farmington, Utah 84025

IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM & JUDY McCLEERY, et al.,	:	
Plaintiffs,	:	
v.	:	Case No. 880401
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 Respondents.	:	

BRIEF OF RESPONDENT BOUNTIFUL CITY

Honorable Rodney S. Page, District Judge, Second Judicial District, Davis County, State of Utah.

ROBERT A. BURTON, 516 STRONG & HANNI Attorneys for Landforms Construction Group, Landforms Development, Inc. Sixth Floor Boston Building Salt Lake City, Utah 84111	LAYNE B. FORBES Attorney for Bountiful City 790 South 100 East Bountiful, Utah 84010
LOWELL V. SMITH, 3006 HANSON, EPPERSON & SMITH Attorneys for Mark S. Sandberg, L. Wayne Redd, Lyle A. Hale, Hale/Redd Investment Group, and Hale/Redd Land Investment 175 South West Temple, Suite 650 Salt Lake City, Utah 84101	MELVIN C. WILSON Davis County Attorney GERALD E. HESS Chief Civil Deputy Davis County Courthouse P. O. Box 618 Farmington, Utah 84025

PARTIES

1. Defendants and third-party plaintiffs are 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. These parties are landowners and developers of property known as Bridlewood located near homeowners' property in Davis County. (The partnership or joint venture formed by Mark S. Sandberg, L. Wayne Redd and Lyle A. Hale has been referred to by different titles; therefore, it is referred to in different ways in the pleadings.)

2. Third-party defendants are Bountiful City and Davis County.

TABLE OF CONTENTS

	<u>Page</u>
PARTIES.....	1
TABLE OF AUTHORITIES.....	4
JURISDICTION OF THE COURT.....	5
ISSUES ON APPEAL.....	6
CONSTITUTIONAL PROVISIONS AND STATUTES.....	6
STATEMENT OF FACTS.....	8
SUMMARY OF ARGUMENT.....	11
ARGUMENT.....	13
POINT I. THE ACTIONS TAKEN BY BOUNTIFUL CITY IN RELATION TO THE BRIDLEWOOD PROJECT WERE IN THE MANAGEMENT OF FLOOD WATERS AND THE CONSTRUCTION, REPAIR AND OPERATION OF FLOOD AND STORM SYSTEMS AND WAS A GOVERNMENTAL FUNCTION WITH ABSOLUTE IMMUNITY.....	13
A. Governmental Function.....	14
B. Absolute Immunity.....	16
POINT II. ASSUMING <u>ARGUENDO</u> THE ACTIONS TAKEN BY BOUNTIFUL CITY WERE NOT INVOLVED IN THE MANAGEMENT OF FLOOD WATERS OR THE CONSTRUCTION, REPAIR AND OPERATION OF FLOOD AND STORM SYSTEMS, SUCH ACTIONS WERE STILL GOVERNMENTAL FUNCTIONS.....	18
A. Governmental Function.....	18
B. Immunity Not Waived.....	19
POINT III. SECTION 63-30-3 IS CONSTITUTIONAL EVEN IN VIEW OF ARTICLE I, SECTION 22 OF THE UTAH CONSTITUTION	
A. Article I, Section 22, of the Utah....	24
Constitution	

POINT IV.	GRANTING BOUNTIFUL ABSOLUTE IMMUNITY IS NOT INCONSISTENT WITH THE PURPOSE OF THE UTAH COMPARATIVE FAULT ACT.....	27
CONCLUSION.....		28

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS CITED

Utah Constitution, Article I, Section 22	13,
	24, 25, 26, 29

STATUTES CITED

Utah Code Annotated, Section 63-30-3 (1986)	12,
	13, 17, 18
Utah Code Annotated, Section 63-30-8 (1986)	19
Utah Code Annotated, Section 63-30-9 (1986)	19
Utah Code Annotated, Section 63-30-10 (1986)	20, 21
Utah Code Annotated, Section 63-30-10.5 (Supp. 1988) ...	13,
	22, 23
Utah Code Annotated, Section 10-8-8 (1986)	21
Utah Code Annotated, Section 57-5-3 (1986)	21
Utah Code Annotated, Section 78-27-38 (1987)	27
Utah Code Annotated, Section 78-27-40 (1987)	27

CASES CITED

<u>Anderson Investment v. State</u> , 503 P.2d 144 (Utah, 1972)	26
<u>Bartlett v. New Mexico Welding Supply, Inc.</u> 646 P.2d 579 (N.Mex. 1982)	28
<u>Bingham v. Board of Education</u> , 223 P.2d 432 (Utah, 1950)	25
<u>Brown v. Keill</u> , 580 P.2d 867 (Kansas, 1978)	28
<u>Campbell Building Company v. State Road Commission</u> , 70 P.2d 857 (Utah, 1937)	25
<u>Carlucci v. Utah State Industrial Commission</u> , 725 P.2d 1335 (Utah, 1986)	23
<u>Fairclough v. Salt Lake County</u> , 354 P.2d 105 (Utah, 1960)	24
<u>Gleave v. Denver and Rio Grande Western Railroad Company</u> 749 P.2d 660 (Utah, app, 1988)	20

<u>Hjorth v. Whittenberg</u> , 241 P.2d 907 (Utah, 1952).....	25,26
<u>Holt v. Utah State Road Commission</u> , 522 P.2d 1286 (Utah, 1973).....	26
<u>Hurst v. Highway Department</u> , 397 P.2d 71 (Utah, 1964)..	25
<u>Little v. Utah State Division of Family Services</u> , 667 P.2d 49 (Utah, 1983).....	20
<u>Madsen v. Borthick</u> , 658 P.2d 627 (Utah, 1983).....	26
<u>Okland Construction Company v. Industrial Commission</u> , 520 P.2d 108 (Utah, 1974).....	22
<u>Pocatello Ind. Park Company v. Steel West Inc.</u> , 621 P.2d 399 (Idaho, 1980).....	28
<u>Sine Hurst v. Highway Department</u> , 397 P.2d 71 (Utah, 1964).....	25
<u>Springville Banking Company v. Burton</u> , supra.....	24,26
<u>Standiford v. Salt Lake City Corp.</u> , 605 P.2d 1230 (Utah, 1980).....	12,18
<u>State Road Commission v. Parker</u> , 368 P.2d 585 (Utah, 1962).....	24,26
<u>State vs. State Road Commission v. District Court</u> , <u>Fourth Judicial District</u> , 78 P.2d 502 (Utah, 1937).....	25,26
<u>Wilkinson v. State</u> , 134 P.2d 626 (Utah, 1913).....	25
<u>Wilson v. Probst</u> , 581 P.2d 380 (Kansas, 1978).....	27

JURISDICTION OF THE COURT

Supreme Court of Utah has jurisdiction to consider and hear this appeal pursuant to the provisions of Section 3 of Article VIII of the Constitution of Utah, Rule 3 of the Rules of Utah Supreme Court, Utah Code Annotated, 78-2-2(3)(j)(1988), and Rule 54(b) of the Utah Rules of Civil Procedure.

ISSUES ON APPEAL

1. Did the District Court err in granting Bountiful Summary Judgment and concluding that the acts complained of in the First Amended Complaint and the Amended Third-Party Complaint involved the management of flood waters or the construction, repair and operation of flood and storm systems.

2. Is Utah Code Annotated, Section 63-30-3 (1986) unconstitutional?

3. Does construing the Utah Comparative Fault Act require that Bountiful remain in the case for the purpose of determining comparative fault?

CONSTITUTIONAL PROVISIONS AND STATUTES

UTAH CONSTITUTION, Article I, Section 22 [private property for public use]

Private property shall not be taken or damaged for public use without just compensation.

UTAH CODE ANNOTATED, Section 63-30-3 (1986)

Immunity of governmental entities from suit.

Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility, and from an approved medical, nursing, or other professional health care clinical training program conducted in either public or private facilities.

The management of flood waters and other natural disasters and the construction, repair, and operation of flood and storm systems by governmental entities and their officers and employees are immune from suit for any injury or damage resulting from those activities.

UTAH CODE ANNOTATED, Section 63-30-8 (1986)

Waiver of immunity for injury caused by defective, unsafe, or dangerous condition of highways, bridges, or other structures.

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.

UTAH CODE ANNOTATED, Section 63-30-9 (1986)

Waiver of immunity for injury from dangerous or defective public building, structure, or other public improvement--Exception.

Immunity from suit of all governmental entities is waived for any injury caused from a dangerous or defective condition or any public improvement. Immunity is not waived for latent defective conditions.

UTAH CODE ANNOTATED, Section 63-30-10 (1986)

Waiver of immunity for injury caused by negligent act or omission of employee--Exceptions--Waiver for injury caused by violation of fourth amendment rights.

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

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

UTAH CODE ANNOTATED, Section 63-30-10.5 (Supp. 1988)

Waiver of immunity for taking private property without compensation.

(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.

(2) Compensation and damages shall be assessed according to the requirements of Chapter 34, Title 78.

UTAH CODE ANNOTATED, SECTION 78-27-38 (1987)

Comparative Negligence.

However, no defendant is liable to any other person seeking recovery for an amount in excess of the proportion of fault to that defendant.

UTAH CODE ANNOTATED, SECTION 78-27-40 (1987)

Amount of liability limited to proportion of fault--no contribution

Subject to Section 78-27-38 the maximum amount for which a defendant may be liable to any person seeking recovery is that percentage of proportion of fault attributed to that defendant. No defendant is entitled to contribution from any other person.

UTAH CODE ANNOTATED, SECTION 10-8-8 (1986)

Streets, parks, airports, parking facilities, public grounds and pedestrian malls.

They may lay out, establish, open, alter, widen, narrow, extend, grade, pave or otherwise improve streets, alleys, avenues, boulevards, sidewalks, parks, airports, parking lots or other facilities for the parking of vehicles off streets, public grounds, and pedestrian malls and may vacate the same or parts thereof, by ordinance.

UTAH CODE ANNOTATED, SECTION 57-5-3 (1986)

Maps and plats to be acknowledged, certified, approved, and recorded.

Such map or plat shall be acknowledged....and certified by the surveyor making such plat; if the land is situated in any city or incorporated town such plat or map shall be approved by its governing body....

STATEMENT OF FACTS

1. Landforms are the developers of Bridlewood Subdivision, located in Bountiful, Utah. The

development is divided into three phases.

2. The preliminary plans of the Subdivision were approved December 5, 1984, (Jack Balling Deposition, Exhibit 90). One of the conditions of the approval was that:

Developer to provide on-site storm detention facilities to satisfaction of Bountiful City, Davis County and adjacent property owners.

3. On July 17, 1985, the City Council granted final approval of Phase I of Bridlewood Subdivision, (Jack Balling Deposition, Exhibit 91) subject to a number of conditions, one of which was:

Providing for storm detention for the runoff in the Hooper Canyon Drainage Basin, with the release rate of 2 c.f.s. The release rate and conditions were agreed upon when the property was annexed by Bountiful.

4. Following the final approval it was ultimately determined by Davis County and agreed to by Landforms, that Landforms participate in the construction of a regional detention basin in Hooper Canyon at the Davis Boulevard site, (Jack Balling Deposition, P.59).

5. Pending the completion of that regional detention basin, Landforms was required to undertake interim flood control measures, (Jack Balling Deposition, p. 62).

6. Landforms was required to construct a road through the Subdivision in order to provide a second access which was required and was pursuant to City Ordinance. (Jack Balling Deposition, p. 85). One of the purposes of streets and the purposes of curbs, gutters, inlet boxes and storm drain lines and storm detention basins is for the

collection and management of storm waters, (Jack Balling Affidavits, R.135, 525).

7. Plaintiffs allege that on a number of occasions since December, 1985 and as recent as August, 1987, but principally on August 20, 1986, storm water runoff coming from Landforms Bridlewood Subdivision damaged their property, thus precipitating this lawsuit.

8. The plaintiffs filed an action against the defendants (Landforms) on December 11, 1986. On October 30, 1987 the plaintiffs filed a First Amended Complaint (R.40) and alleged in five causes of action that damages were sustained from:

(1) "....diverting the natural flow of runoff from the property"

(2) "allowing excessive and substantial runoff water to flood plaintiffs' properties"

(3) "the instances of flooding caused by wrongful action and admission of the defendants....interfered with plaintiffs use and enjoyment of their property"

(4) "defendants have been put on notice of the numerous floodings...."

(5) "defendants acted maliciously and wantonly in complete disregard for the rights and safety of plaintiffs in causes of action 1 through 4"

9. Landforms filed an Amended Third-Party Complaint, (R.418) wherein they alleged:

(14) "In the event these defendants are found

liable to plaintiffs....therefore, in such event, these defendants are entitled to be fully indemnified and recover judgment over against Bountiful City and Davis County...."

10. They further alleged Bountiful City and Davis County negligently delayed the construction of the Bridlewood Subdivision by their indecision with respect to the regional detention basin....this delay caused a potential flood hazard to exist in that Bridlewood remained only partially complete without curb, gutter, asphalt roads, catch basins and a permanent storm detention facility.... they further alleged that Bountiful City and Davis County negligently and carelessly required third-party plaintiffs to cut one roadway in Bridlewood from top to bottom.

4. Bountiful filed a Motion for Summary Judgment, (R.133). The Court granted Summary Judgment (R.446). The court concluded that:

(4) The immunity granted by the Act extends to the acts or the failure to do the acts of planning, designing, constructing, repairing and operating or managing flood waters.

SUMMARY OF ARGUMENT

The judgment of the trial court should be affirmed.

A. The action of Bountiful with respect to the Bridlewood Subdivision involved the management of flood waters or the construction, repair and operation of flood and storm systems and was thus a governmental function with absolute immunity.

In plaintiffs' Amended Complaint, they allege that the defendants (Third-Party Plaintiffs and others) through their acts and omissions negligently and carelessly planned, designed and developed flood control improvements, causing plaintiffs damages. In Landforms Amended Third-Party Complaint they allege that the flood and storm control work was performed in accordance with Bountiful City's requirements and they were prevented from developing a storm detention basin and that Bountiful delayed construction of the subdivision; delayed making a decision on the construction of a regional detention basin; required a road from top to bottom of the project. All of these acts complained of relate to the management of flood waters or the construction, repair and operation of flood and storm systems.

B. The second paragraph of Section 63-30-3 of the Utah Governmental Immunity Act (at all times hereafter, the "Act") granted absolute immunity for the management of flood waters and the construction, repair and operation of flood and storm systems by governmental entities.

C. Even if the actions of the City was not a governmental function under Section 63-30-3 of the Act, which it was, such actions were governmental functions under the test in Standiford v. Salt Lake City Corp., *infra*. The actions are of "such a unique nature that it can be only performed by a governmental agency or that it is essential to the core of governmental activity".

D. Immunity is not waived for injury from dangerous or defective structures or other improvements, or for injury caused by defective condition of highway, bridges or other structures, because those acts are not elements of the causes of actions and were not complained of in the Amended Complaint or the Amended Third-Party Complaint. Additionally, Section 63-30-3 of the Act grants absolute immunity.

E. The waiver under Section 63-30-10.5 of the Act does not apply as it was enacted after the acts complained of and the damages sustained. Additionally, the "taking" or "damage" of private property does not relate to unintentional damage or negligence sounding in tort.

F. Article I, Section 22 of the Utah Constitution does not render Section 63-30-3 of the Act invalid. The constitutional provision is not self-executing and does not include unintentional or negligent damages sounding in tort.

G. Granting absolute immunity is not inconsistent with the Utah Comparative Fault Act. The Comparative Fault Act does not require the inclusion of all parties to the action and the court, even so, can consider the comparative fault of all parties to an occurrence or incident even though some of them are not party litigants.

ARGUMENT

POINT I

THE ACTIONS TAKEN BY BOUNTIFUL CITY IN
RELATION TO THE BRIDLEWOOD PROJECT INVOLVED
THE MANAGEMENT OF FLOOD WATERS AND THE
CONSTRUCTION, REPAIR AND OPERATION OF FLOOD
AND STORM SYSTEMS AND WAS A GOVERNMENTAL
FUNCTION WITH ABSOLUTE IMMUNITY

A. Governmental Function

Landforms suggests that the actions taken by Bountiful City in relation to the Bridlewood project did not involve the management of flood waters or the construction, repair, or operation of flood and storm systems.

To consider this issue we must go to plaintiffs' First Amended Complaint (R.40) and Landforms Amended Third-Party Complaint. (R.418). In plaintiffs' First Amended Complaint it is alleged that the defendants (third-party plaintiffs and others) through their acts and omissions negligently and carelessly planned, designed and developed and constructed improvements which changed natural conditions and contour of the property, thus increasing, aggravating, concentrating and diverting the natural flow of runoff and causing flood damage. And from the foregoing the defendants were negligent, trespassed, caused a nuisance and intentionally inflicted and caused emotional distress.

Landforms' Amended Third-Party Complaint alleges:

(Paraphrased)

(a) Flood and storm control work performed by third-party plaintiffs was in accordance with Bountiful City and Davis County requirements. This work:

(1) Prevented third-party plaintiffs from developing their own storm detention basin.

(2) Delayed construction of the subdivision which caused potential flood hazards.

(3) Delayed making a decision on the construction of a regional storm detention basin.

(4) Required a road from top to bottom of the project which acted as a funnel or channel for waters which flowed in plaintiff's property and caused damage.

In the affidavit and supplemental affidavit of Jack P. Balling, Bountiful City Engineer, he indicated that:

4. One of the purposes of streets and the purposes of curbs, gutters, inlet boxes and storm drain lines and storm detention basins are for the collection and management of storm waters. (Affidavit).

3. The flood and storm water systems devised by Davis County and Bountiful City consists of creeks and waterways; a complex of streets, curbs, gutters, inlet boxes and storm drain pipes, culverts and water detention basins. (Supplemental Affidavit).

4. The streets, curbs, gutters, inlet boxes, storm drain pipes, culverts and water detention basins within the Bridlewood Subdivision and the plans and construction of the particular regional detention basin mentioned in the third-party plaintiffs' complaint is a part of this system and is within the Hooper Canyon drainage district system. (Supplemental Affidavit).

The lower court granted Bountiful's motion for summary judgment and concluded as a finding of fact:

The immunity granted by the Act extends to the acts or the failure to do the acts of planning, designing, constructing, repairing and operating or managing flood waters.

It is 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.

B. Absolute Immunity

Section 63-30-3 of the Act, as amended, grants absolute immunity to governmental entities engaged in the management of flood waters and the construction, repair and operation of flood and storm systems.

During its 1984 budget session the Utah Legislature passed a "Flood Relief" Bill, Senate Bill 97, that contained an amendment to Section 63-30-3 of the Act. The Section with the amended portion reads as follows:

Except as may be otherwise provided in this [act] Chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility, and from any approved medical, nursing or other professional health care clinical training program conducted in either public or private facilities.

The management of flood waters and the construction, repair, and the operation of flood and storm systems by governmental entities are considered to be governmental functions, and, governmental entities and their officers and employees are immune from suit for any injury or damage resulting from these activities.

(Emphasis added)

It should be noted that 63-30-3 of the Act is divided into two independent provisions. Prior to 1984 the first paragraph existed alone, granting an immunity from suit qualified by the phrase "except as may be otherwise provided in this Chapter".

Following the statewide floods of 1983, the

Legislature amended Section 3 by adding the second paragraph. That new provision gives an absolute and unqualified immunity from suit to governmental entities for flood and storm-related activities.

The qualifying language found in the first paragraph of Section 63-30-3 of the Act does not apply to the construction, repair and operation of flood and storm systems. If the Legislature had intended for the qualifying phrase to carry over to the new provision, it would have completed the amendment at that point where it defined these activities as a "governmental function" and would have simply added it to the first paragraph rather than creating an entirely new paragraph. By enacting a second paragraph with the clear language that governmental entities and their officers and employees "are immune from suit for any injury or damage resulting from" flood related activities, however, the Legislature intended and accomplished the statement that such activities are given absolute immunity.

Decisions rendered by the First, Second, Third, Fourth Judicial Districts, with factual similarities and identical legal issues, as the incident case, have held that governmental entities are immune from suit for the management of flood waters and the construction, repair and operation of flood and storm systems. Although these decisions are not binding on this court, they do provide persuasive authority and this court should adhere to these consistent, well-reasoned decisions.

POINT II

THE ACTIONS TAKEN BY BOUNTIFUL CITY IN THE MANAGEMENT OF FLOOD WATERS AND THE CONSTRUCTION, REPAIR AND OPERATION OF FLOOD AND STORM SYSTEMS, WAS A GOVERNMENTAL FUNCTION

A. A Governmental Function

Landforms argues that the actions taken by Bountiful City are not governmental functions. In Point I Bountiful argued that the actions taken by Bountiful involved the management of flood waters and the construction, repair and operation of flood and storm systems. It then follows that such activities are governmental functions by virtue of paragraph 2 of Section 63-30-3 of the Act which provides:

The management of flood waters and other natural disasters and the construction, repair and operation of flood and storm systems by governmental entities are considered to be governmental functions and governmental entities and their officers and employees are immune from suit for any injury or damage resulting from these activities. (Emphasis added)

We submit that this statute is controlling and dispositive. We hesitate to argue any alternative position, but will do so. Even if the foregoing Section is not controlling, which we firmly submit that it is, under all other tests the actions of Bountiful City were "governmental functions". The actions were governmental functions under the test in Standiford v. Salt Lake City Corp., 605 P.2d 1230 (Utah, 1980) at page 1236:

The [Test] for determining governmental immunity is whether the activity under consideration is of such a unique nature that it can only be performed

by a governmental agency or that it is essential to the core of governmental activity.

In this situation only a government can make decisions on a city-wide flood control system or establish a city-wide street system or approve a subdivision. Such actions are clearly a governmental function under Standiford, supra.

B. Immunity Not Waived.

No statutory waivers apply to this situation as immunity is absolute. Landforms argue a waiver under Section 63-30-8 of the Act, a waiver of immunity for injury caused by defective, unsafe or dangerous condition of highways, bridges or other structures. It is not alleged either in plaintiffs' First Amended Complaint or in the Amended Third-Party Complaint that there was a defective, unsafe or dangerous condition of a highway, bridge or other structures.

Landforms argues a waiver under Section 63-30-9, which provides for a waiver of immunity for injury from dangerous or defective public buildings, structures or other public improvements. In plaintiffs' First Amended Complaint and in Landforms Amended Third-Party Complaint they do not allege a dangerous, defective structure, dam, reservoir or other public improvement and they cannot raise it on appeal.

Again, it is not shown that a dam, reservoir or other public improvement was defectively made. Nothing broke or collapsed due to being defectively made.

Landforms next argue a waiver under Section 63-30-10 of the Act, which provides for a waiver of immunity for injury caused by the negligent act or omission of an employee, but provides there is no waiver if the negligence:

(a) Arises from the exercise or performance of or the failure to exercise or perform a discretionary function.

In this case the decisions of whether to have a regional detention basin or not and whether to have a road put in fully or in phases, are discretionary. Gleave v. Denver and Rio Grande Western Railroad Company, 749 P.2d 660 (Utah, app, 1988) sets forth an approach to this issue:

More recently in Little v. Utah State Division of Family Services, 667 P.2d 49 (Utah, 1983), the Court adopted the following test for distinguishing between functions at the policy-making level from those at the operational level, requiring affirmative answers to four preliminary questions in order for an act to be purely discretionary:

(1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program or objective?

(2) Is the question, 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?

In this particular case the actions of Bountiful complained of by Landforms were purely discretionary for the following reasons:

(1) The challenged acts (full-length road and regional detention basin) involve basic governmental policies, programs or objectives. A coherent, workable street plan is a policy of the City. Also, a flood control system utilizing streets and regional detention basins is a governmental program and objective.

(2) Landforms urge that the local detention basin system was better but this would change the course and direction of the government's policies, programs and objectives. The same is true for streets.

(3) The decisions concerning streets and a regional detention basin system, are an exercise of a basic policy evaluation and judgment based on the expertise on the part of the government.

(4) The actions of Bountiful are fully authorized by lawful authority. The authority to lay out streets is given in Section 10-8-8, UCA, 1953, and to approve subdivisions in Section 57-5-3, UCA, 1953. The city's plan of a regional detention system is pursuant to a county-wide flood control system, authorized by Davis County Ordinance No. 01-87.

Meeting all four requirements the actions complained of were purely discretionary and therefore immunity is not waived under 63-30-10.

Plaintiff also contends that the 1987 enactment of Section 63-30-10.5 of the Act now authorizes the maintenance of the suit for the "taking" or "damage" of private property for public use without just compensation. The City concurs that such a suit may be brought if the Legislature has enacted appropriate enabling legislation. They have not done so.

In the instant case, Section 63-30-10.5 is of no avail to third-party plaintiffs for two reasons: (1) The statute gives rise to a new cause of action which did not exist prior to April, 1987, (the effective date) and, (2) The statute does not contemplate suit sounding in tort or negligence. In paragraph 26 of plaintiff's First Amended Complaint, they alleged that instances of flooding "occurred on numerous occasions since December, 1985, and as recent as August, 1987....". In third-party defendant Bountiful's First Set of Interrogatories to Plaintiffs, the question was asked of the plaintiffs to indicate the dates of all floods which plaintiffs allege caused them damages. The answer to that interrogatory no. 1 was the first week in December, 1985, on or about March 9, 1986, on or about July 23, 1986, on or about August 20, 1986, and September, 1986.

Section 63-30-10.5 is not retroactive. The principles relating to retroactive application of laws enacted by the Legislature are settled in Okland Construction Company v. Industrial Commission, 520 P.2d 108 (Utah, 1974). A later statute or amendment should not be

applied in a retroactive manner to deprive a party of his rights or impose a greater liability upon him. That principle has no application when the latter statute or amendment deals only with the clarification or application as to how the laws should have been understood prior to its enactment. This court stated in Carlucci v. Utah State Industrial Commission, 725 P.2d 1335 (Utah, 1986)

The law establishing substantive rights and liabilities when a cause of action arises, and not a subsequently enacted statute, governs the resolution of a dispute....However...statutes which are procedural only and do not create, alter or destroy substantive rights may be applied to courses of action that have accrued or are pending at the time the statute is enacted. (Emphasis added)

The 1987 enactment of Section 63-30-10.5 created a substantive right which theretofore had not existed where the flooding damage occurred in 1985 and 1986.

Secondly, in a proper case for application of Section 63-30-10.5, it is clear that the action is meant to cover only those "takings" or "damagings" occurring pursuant to sovereign power of eminent domain. The Section does not apply where property damage results from the negligence of governmental entities. Where there is no deliberate "taking" or necessary damage of private property for public use, but only negligence of governmental officers or employees engaged in the execution of a governmental function, then no constitutional claim against the governmental entity exists, rather, the claim sounds in tort and requires a common law action for damages.

In his concurring opinion in Springville Banking Company v. Burton, 349 P.2d 157, (Utah, 1960), Justice Wade said at page 166:

Such compensation must result from or grow out of a public use of property, either the property taken or other property used for a public purpose....Such public use must be (1) the State is entitled to make, and it must be intentionally made by the duly constituted public officers and not be merely the result of negligence or other wrongful acts which create ordinary tort liability. (Emphasis added)

In his dissent in Fairclough v Salt Lake County, 354 P.2d 105 (Utah, 1960), Justice Wade said at 110-111:

This provision (Article I, Section 22, Utah Constitution) clearly requires the taking or damaging of tangible private property and that the public use must be intentional and not merely accidental or negligently caused. So damages for personal injuries or from breach of contract and all damages except from an intentional public use are not included in such consent.

...It is generally recognized that accidental or negligent injury is not a damage to private property for public use, so that case has no bearing on our problem.

POINT III

SECTION 63-30-3 IS CONSTITUTIONAL EVEN IN VIEW OF ARTICLE I, SECTION 22 OF THE UTAH CONSTITUTION

A. Article I, Section 22 of the Constitution of Utah.

The Utah Case Law on this issue is stated in the opinions of Utah Supreme Court Justices Henroid and Wade. Their concurring opinions, dissents and rebuttals are in Springville Banking Company v. Burton, supra; Fairclough v. Salt Lake County, supra; and, State Road Commission v. Parker, 368 P.2d 585 (Utah, 1962); firmly establish the

application and meaning of Article I, Section 22 of the Utah Constitution. Justice Henroid's view was upheld by the Utah Supreme Court. When Justice Wade was in dissent, he was alone. The Court's position is without qualification, equivocation or condition, that sovereign immunity protects governmental entities in the State of Utah from suits brought for the purpose of obtaining compensation, for the taking or damaging of private property for public use; and that Article I, Section 22 of the Utah Constitution is not self-executing so as to constitute a waiver of that immunity. Further, the cases have clearly set forth the rule that consent for the State (governmental entities) to be sued is a legislative matter and will not be created nor inferred by the courts. These holdings are based upon the precedence of Wilkinson v. State, 134 P. 626 (Utah, 1913); Campbell Building Company v. State Road Commission, 70 P.2d 857 (Utah, 1937); State vs. State Road Commission v. District Court, Fourth Judicial District, 78 P.2d 502 (Utah, 1937); Bingham v. Board of Education, 223 P.2d 432 (Utah, 1950); Hjorth v. Whittenberg, 241 P.2d 907 (Utah, 1952). These holdings continued without any change whatsoever up to the passage of the Legislature of the Governmental Immunity Act (63-30-1 et.seq.) Utah Code, 1953; see Hurst v. Highway Department, 397 P.2d 71 (Utah, 1964); and Sine v. Helland, 418 P.2d 979 Utah, 1966); therefore, the Governmental Immunity Act (the "Act") "substituted a statutory framework" for the common law of sovereign immunity existing prior

thereto in the State, "to be interpreted by the Courts and re-shaped by the Legislature as necessary from time to time". Madsen v. Borthick, 658 P.2d 627 (Utah, 1983), 629-630.

Upon its enactment in 1965 this statutory framework for governmental immunity did not provide consent for the sovereign to be sued for "taking" or "damaging" private property for public use. The Act retained sovereign immunity, except as waived therein. As a result the Utah Supreme Court found no basis in the Act to permit a suit, pursuant to Article I, Section 22.

In Holt v. Utah State Road Commission, 522 P.2d 1286 (Utah, 1973), the Court stated:

The law has long been established in this State that under (the claim of taking a property without compensation) there can be no recovery from the State for damages.... Sufficient has been said as to the pro and con of this subject that we think it unnecessary and undesirable to extenuate thereon, but refer to the adjudicated cases.

The Court's reference is to the following cases:

State v. Fourth District Court, supra; Hjorth v. Whittenberg, supra; Fairclough v. Salt Lake County, supra; Springville Banking Company v. Burton, supra; State v. Parker, supra; and Anderson Investment Corp., v. State of Utah, 503 P.2d 144 (Utah, 1972).

Thus, there is absolutely no basis for third-party plaintiffs in this case to seek or obtain recovery from Bountiful pursuant to Article I, Section 22 of the Utah Constitution.

POINT IV

GRANTING BOUNTIFUL ABSOLUTE IMMUNITY IS NOT INCONSISTENT WITH THE PURPOSE OF THE UTAH COMPARATIVE FAULT ACT

Landforms urges that the Utah Comparative Fault Act requires the fault of all parties to an occurrence be compared at trial in order for the fault of the respective parties to be accurately apportioned. They cite the following:

78-27-38 Comparative Negligence....

However, no defendant is liable to any other person seeking recovery for an amount in excess of the proportion of fault to that defendant.
(Emphasis added)

78-27-40 Amount of Liability Limited to Proportion of Fault--No Contribution

Subject to Section 78-27-38 the maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion of fault attributed to that defendant. No defendant is entitled to contribution from any other person.
(Emphasis added)

The Sections above cited do not require the inclusion of all parties to make a determination of comparative fault. None of the cases cited by Landforms stand for the proposition that applying the provisions of the Utah Comparative Fault Act in effect constitutes a waiver of governmental immunity.

Landforms cites a number of cases: In Wilson v. Probst, 581 P.2d 380 (Kan., 1978) the State as a Third-Party plaintiff, was dismissed out of the suit by the lower court. The court held that the State had to remain as a named party, even though liability could not be established

against the State given its immunity. In Brown v. Keill, 580 P.2d 867 (Kan., 1978), the court held that the liability for damages based on the proportionate fault of all the parties to the occurrence, could be considered, even though one or more parties cannot be joined formally as a litigant. In Pocatello Ind. Park Company v. Steel West Inc. 621 P.2d 399 (Id., 1980), the court held that a jury must have the opportunity to consider the negligence of all parties, whether or not they be parties to the lawsuit. In Bartlett v. New Mexico Welding Supply, Inc. 646 P.2d 579 (N.Mex., 1982), the court quoted with approval, Heft and Heft Comparative Negligence Manual (1978, Section 8.131):

It is accepted practice to include all tort feasons in the apportionment question. This includes non-parties who may be unknown tort feasons, phantom drivers and persons alleged to be negligent but not liable in damages to the injured party, such as in the Third-Party cases arising in Workmen's Compensation area.

Bountiful contends that the Utah Comparative Fault Act does not require the inclusion of all parties in order to determine comparative fault. Even so, case law suggests that if all parties to the occurrence must be considered in determining the comparative fault process, they need not be parties to the suit.

CONCLUSION

Bountiful submits that the District Court did not err in granting Bountiful a Summary Judgment upon the basis that their actions involved the management of flood waters and other natural disasters, or the construction, repair and

operation of flood storm systems and thus that they were absolutely immune from suit.

Section 63-30-3 of the Act is not unconstitutional in light of Article I, Section 22, of the Utah Constitution, which is not self-executing and does not apply to unintentional or negligent takings sounded in tort.

Immunity is not waived by any of the Sections granting waivers of immunity and applying and enforcing the Utah Comparative Fault Act does not require that Bountiful be included in a party litigant and does not waive immunity.

It is respectfully requested that the judgment of the trial court be affirmed.

Dated this 1st day of April, 1989.

By Layne B. Forbes

LAYNE B. FORBES
Attorney for Respondent and
Third-Party Defendant, the
City of Bountiful

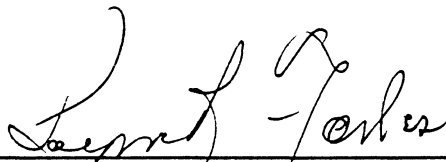
CERTIFICATE OF DELIVERY

I hereby certify that on this 3rd day of April,
1989, three true and correct copies of the foregoing Brief
were delivered to:

MELVIN C. WILSON
Davis County Attorney
GERALD E. HESS
Chief Civil Deputy
Davis County Courthouse
P.O. Box 618
Farmington, Utah 84025

ROBERT A. BURTON, 516
STRONG & HANNI
Attorneys for Landforms
Construction Group,
Landforms Development, Inc.
Sixth Floor Boston Building
Salt Lake City, Utah 84111

LOWELL V. SMITH, 3006
HANSON, EPPERSON & SMITH
Attorneys for Mark S. Sandberg,
L. Wayne Redd, Lyle A. Hale,
Hale/Redd Investment Group, and
Hale/Redd Land Investment
175 South West Temple, Suite 650
Salt Lake City, Utah 84101



LAYNE B. FORBES
Bountiful City Attorney
P. O. Box 369
Bountiful, Utah 84011-0369

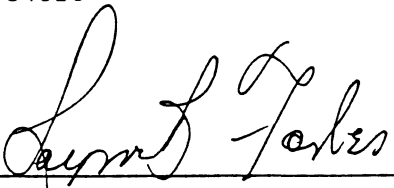
CERTIFICATE OF MAILING

I certify that on this 3rd day of April, 1989, a courtesy copy of the foregoing brief was mailed, postage prepaid, to:

RICH HUMPHERYS
CHRISTENSEN, JENSEN & POWELL, P.C.
Attorneys for Plaintiffs
510 Clark Leaming Building
175 South West Temple
Salt Lake City, Utah 84101

D. MICHAEL NIELSON
Attorney for Verl Smart
Sessions Place
505 South Main Street
Bountiful, Utah 84010

GEORGE FADEL
Attorne for the Consortium
170 West 400 South
Bountiful, Utah 84010



A handwritten signature, "Lynn J. Faries", is written in cursive above a horizontal line. A vertical line extends downwards from the center of the horizontal line.