

1988

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

Utah Supreme Court

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BRIEF

DOCKET NO. 880401 IN THE SUPREME COURT OF THE STATE OF UTAH

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WILLIAM & JUDY McCLEERY, et al.,	:	
Plaintiffs,	:	Case No. <u>880401</u>
v.	:	Priority 14(b)
LANDFORMS CONSTRUCTION CORP., et al.,	:	
Defendants.	:	

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LANDFORMS CONSTRUCTION CORP.; LANDFORMS DEVELOPMENT INC.; MARK S. SANDBERG; L. WAYNE REDD; LYLE A. HALE; HALE/REDD INVESTMENT GROUP, a general partnership aka 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.	:	

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BRIEF OF RESPONDENT DAVIS COUNTY

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

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MAR 31 1989

IN THE SUPREME COURT OF THE STATE OF UTAH

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WILLIAM & JUDY McCLEERY, et al., :  
Plaintiffs, : Case No. 88041  
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 :  
aka 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. :

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BRIEF OF RESPONDENT DAVIS COUNTY

Appeal from the Judgment of the Second Judicial District Court,  
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## PARTIES

1. Plaintiffs are William and Judy McCleery, Mark and Teresia Pantelakis, Dennis and Gloria Anderson, James and Linda Stover, David C. Fricke, Barrie D. and Katherine Brewer, Ronald and Kerma Jones, Richard and Barbara Kristensen, Lyle and Alice Laraine Gordon, and S. Michael and Sandra J. Inman. Plaintiffs are Davis County homeowners who claim to have sustained property damage. Plaintiffs are not parties to this appeal.

2. Defendants and Third-Party Plaintiffs are Landforms Construction Corp., Landforms Developments Inc., Mark S. Sandberg, L. Wayne Redd, Lyle A. Hale, Hale/Redd Investment Group, a general partnership, aka 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 Bountiful City. (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.)

3. Defendants who are not Third-Party Plaintiffs are Verl G. Smart, an owner of property located near homeowners' property in Davis County and the Consortium, Inc., an engineering company which did engineering work on Bridlewood. These Defendants are not parties to the appeal.

4. Third-Party Defendants are Bountiful City and Davis County.

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## **JURISDICTION OF THE COURT**

The 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 the Utah Supreme Court, Utah Code Ann. Section 78-2-2(3) (j) (1988), and Rule 54(b) of the Utah Rules of Civil Procedure. The Second Judicial District court entered Final Summary Judgment in favor of the Third-Party Defendants, Bountiful City and Davis County on October 11, 1988, and certified the Judgment for appeal. A Notice of Appeal was filed on October 25, 1988.

## **ISSUES ON APPEAL**

1. Section 63-30-3, Utah Code Ann. (1986) grants Respondent Davis County Immunity from suit by Appellants.
2. The Utah Governmental Immunity Act is consistent with Article I, Section 22 of the Utah Constitution.

## **CONSTITUTIONAL PROVISIONS AND STATUTES**

1. Utah Constitution, Article I, Section 22.
2. Utah Governmental Immunity Act, Utah Code Annotated, Sections 63-30-3 and 63-30-10.5.

## **STATEMENT OF THE CASE**

This case began as a property damage action brought by the Plaintiffs (hereinafter "homeowners") against several Defendants, including the owners and developers of land known as the Bridlewood Development. The homeowners' complaint, in substance, sought to recover compensation for property damage resulting from floods which occurred in 1986. Third-Party

Plaintiffs brought an action against Bountiful City and Davis County for contribution, indemnity, and a comparison of fault by way of a Third-Party Complaint.

Third-Party Plaintiffs seek review of the Order of the Second Judicial District Court granting summary judgment to Third-Party Defendants (Bountiful City and Davis County) which was entered on October 11, 1988.

#### **STATEMENT OF FACTS**

Appellants have set forth in their brief a lengthy Statement of Facts which they contend support their claim that the decision of the lower Court should be overruled. However, Appellants' Statement of Facts ignores some important facts, and in several instances, misstates the facts. The facts set forth hereafter will either focus on those ignored by Appellants or misstated by Appellants:

1. The property owned or controlled by Appellants was annexed into Bountiful City August 29, 1984. (Annexation Plat, Exhibit 58)

2. Property along Monarch Drive, immediately below the property annexed into Bountiful City, remained in the unincorporated area of Davis County. (Annexation Plat, Exhibit 58)

3. The developers were required to obtain subdivision approval for their plans from the Bountiful City Planning and Zoning Commission, the Bountiful City Council, and the Bountiful City Engineer prior to beginning actual construction of the project. (R.488)



4. As a condition to the approval of the Bridlewood Subdivision of Appellants, the Bountiful City Planning Commission required the Appellants to construct a detention basin on property of the developer or participate in the construction of a regional detention basin with Davis County by funding a portion of the cost of the regional detention basin. (Sandberg Depo. p.56)

5. Appellants, applied to and obtained from Bountiful City on November 27, 1985, a bond agreement for completion of subdivision improvements. (Exhibit 103)

6. Appellants discussed the location, the approximate size and detail of the outflow of the temporary detention basin with Bountiful City officials. (Sandberg depo. p.154)

7. Bountiful City Inspectors and City Engineer were concerned about the measures the developer was taking to prevent temporary storm runoff and Bountiful City Engineers gave their professional opinions and directions. (Sandberg depo. p.157)

8. Appellants were concerned that they did what Bountiful required them to do regarding temporary storm retention. (Sandberg depo. p.159)

9. Bountiful City directed the detention basin to be dredged on several occasions. (Sandberg depo. p.163)

10. Bountiful City gave the recommendation for the size of the outflow line of the temporary retention basin. (Sandberg depo. p.168)

11. Heavy "100 year storms" occurred on July 23 and August 20, 1986, which, combined with conditions then existing on

the Bridlewood Subdivision caused the Plaintiffs to sustain the damages for which they seek recovery in this lawsuit. (R.40)

12. After the July 23, 1986, storm, Bountiful City recommended to Appellants that the temporary retention basin be increased in its size. (Sandberg depo. p.171)

13. Mark Sandberg, one of the Appellants, talked with Davis County in general terms about what was being done with the Bridlewood project, but specific approval on all phases of the Bridlewood Subdivision came from Bountiful City. (Sandberg depo. p.173)

14. Mark Sandberg, one of the Appellants, did not feel he needed any approval from the Respondent Davis County to proceed with the temporary detention basin or in any of the Bridlewood Subdivision because Davis County had no authority to prevent development of the retention basin or the Bridlewood Subdivision. Information communicated to Davis County was as a courtesy only. (Sandberg depo. p.175)

15. When development of Bridlewood Subdivision actually started, the developers were required by Bountiful City and not Davis County to construct the access road in its entirety, rather than in phases. (Balling depo. p.85 and Balling depo. p.128-129)

#### **SUMMARY OF ARGUMENT**

Respondent Davis County urges this Court to uphold the decision of the trial Court which granted Respondent Davis County's Motion for Summary Judgment.

Respondent Davis County first argues that the factual basis relied upon for support of much of Appellants' position is

simply incorrect. The facts are clear and undisputed that Respondent Davis County did not require the construction of the road in Appellants' subdivision. Appellants assert that the decision to construct the road in their subdivision should not be shielded by governmental immunity. Since Respondent Davis County had no authority to make any decision on the roadway and in fact made no decision on the roadway requirement, Appellants' arguments related thereto simply do not apply to Respondent Davis County.

Respondent Davis County next argues that management of the flood waters or construction of the flood and storm water systems are defined by statutes as being governmental functions. Any damage Appellants may have suffered which can be apportioned to Respondent Davis County resulted either from Respondent Davis County's failure to manage flood waters or its failure to construct flood and storm water systems. Governmental immunity applies not only to the exercise of a governmental function, but also to a failure or omission to exercise a governmental function. Respondent Davis County is, therefore, immune from suit.

Finally, Respondent Davis County argues that when all of the provisions of the Utah Governmental Immunity Statute are considered together, they are not in conflict with an express constitutional provision. To rule in favor of Appellants and strike down Section 63-30-3 Utah Code Annotated (1986) would be premature since the lower Court has made no ruling on what, if

any, property rights of Appellants may have been taken or damaged for public use by Respondent Davis County.

## **ARGUMENT**

### **Point I**

SECTION 63-30-3, UTAH CODE ANN. (1986) GRANTS RESPONDENT DAVIS COUNTY IMMUNITY FROM SUIT BY APPELLANTS.

The Utah Governmental Immunity Act, Section 63-30-3 (1986), states in pertinent part the following:

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 those activities.

For purposes of analysis, Appellants in their Brief divide Respondent Davis County's activities into two distinct areas. First, Respondent Davis County imposed a requirement that an access road be constructed in a single phase, rather than in the three phases Appellants desired. Second, Respondent Davis County delayed getting its regional detention basin constructed in a timely way, thereby foreclosing Appellants' option to construct their own on site detention facility.

Appellants' first statement is simply not supported by the undisputed facts. There can be no question that the subdivision development of Appellants was located within Bountiful City, so that Respondent Davis County had no authority to approve or disapprove any planning decisions made by Bountiful City. In addition, numerous times in Appellants' Brief

Appellants state that Bountiful City and Davis County required the construction of the access road. It is Appellants' contention that the construction of the access road in a single phase was a contributing cause of the damage Plaintiffs suffered. There can be no question that Davis County, in fact, did not require any access road be constructed in a single phase or in multiple phases. The authority to make the decision and the decision to require the road to be constructed in a single phase was that of Bountiful City, and not Davis County. Consequently, any argument Appellants make as to damages sustained by virtue of the road requirement has no application to Respondent Davis County.

The second point Appellants focus upon can be summarized simply. It is that Respondent Davis County delayed in building a regional detention basin. As a result of Respondent Davis County's failure to build the regional detention basis timely, the August 20, 1986, storm was not managed by Respondent Davis County and Plaintiffs were damaged thereby.

Appellants urge this Court to "focus on the cause of the problem...and not the result of the problem." As it relates to Respondent Davis County, the cause of the problem was Davis County's failure to manage flood waters or its failure to construct a flood and storm system to contain the "100 year rainstorm" which occurred on August 20, 1986. Appellants contention is that if Davis County had managed the flood waters through the retention basin which it failed to build, no damage or very little damage would have been suffered by Plaintiffs.

Section 63-30-3, Utah Code Ann. (1986), declares that the management of flood waters and other natural disasters and the construction of storm systems by governmental entities are governmental functions and governmental entities, which includes Davis County, are immune from suit for any injury or damage resulting from the management of flood waters or the construction of a flood and storm system.

For purposes of this Brief, there is no question that Davis County did not manage flood waters or construct a flood and storm water system to prevent damage to Plaintiffs. This Court, however, has ruled that governmental immunity applies not only to the exercise of a governmental function, but also to a failure or omission to exercise a governmental function. In Madsen v. Brothick, 658 P.2d 627 (Utah 1983), depositors in Grove Finance Company brought an action against the Commissioner of the Department of Financial Institutions of the State of Utah seeking reimbursement for their lost deposits. The Plaintiffs alleged that because the Commissioner of Financial Institutions failed to perform his responsibilities, the depositors lost their money in an insolvent Grove Finance Company. This Court, through Justice Oaks said,

Finally, we see no merit in Plaintiffs' argument that Section 63-30-3's conferral of immunity from suit for injuries which result "from the exercise of a governmental function" (emphasis added) withholds immunity for injuries resulting from a failure or omission to act. Whether an act is deemed to be an act of commission or omission often depends on how the occurrence is described. An important legal consequence should not be at the mercy of semantics. We are unwilling to read this

artificial distinction into the Governmental Immunity Act in the absence of a clearly expressed legislative purpose to that effect. We find none. In fact, the use of the words "act or omission" elsewhere in the statute, e.g., Section 63-30-4 and Section 63-30-10, provides clear indication that no such distinction was intended.

at page 631.

In Brothick, this Court struggled with the question of whether the activities of the Commissioner of Financial Institutions were activities that could only be performed by a governmental agency. In this case, the legislature has specifically declared that management of flood waters and other natural disasters and the construction of flood and storm systems by governmental entities are, "considered to be governmental functions." By statutory definition, therefore, the management of flood waters or construction of flood and storm systems is a governmental function. The grant of immunity includes the exercise of a governmental function as well as the failure or omission to exercise a governmental function. Respondent Davis County urges this Court to uphold the Summary Judgment granted by the District Court.

## **Point II**

THE UTAH GOVERNMENTAL IMMUNITY ACT IS  
CONSISTENT WITH ARTICLE I, SECTION 22 OF THE  
UTAH CONSTITUTION.

Article I, Section 22 of the Utah State Constitution  
states,

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

Consistent with Article I, Section 22 of the Utah Constitution, is Section 63-30-10.5, Utah Code Ann. (1986) which provides the following:

(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.

If Respondent Davis County has taken or damaged private property of Appellants for public use, Appellants are entitled to bring an action against Respondent Davis County pursuant to Chapter 34, Title 78. No such action has been filed. No determination has been made by the lower court of whether Respondent has taken or damaged private property of Appellants. Hence, there is no action from which an appeal can be taken. At this juncture, Appellants' property rights, if any, are contingent at best. Appellants are essentially asking this Court to render an advisory opinion on a matter which is not presently ripe for determination by the Court.

If this Court were to declare Section 63-30-3 unconstitutional based upon the present facts of this case, this Court would set a dangerous precedent and greatly expand the definition of what constitutes private property for which compensation must be paid. Likewise, the definition of what constitutes a taking or damaging of private property and the definition of what constitutes a public use would be



significantly expanded. Such a precedent would be set when there were no facts before the lower Court, nor are there any before this Court to identify what property of Appellants has been damaged or taken. In addition, the record is devoid of any facts which show what public use the property of Appellants has been put to.


Section 63-30-3, Utah Code Ann. (1986), is not squarely in conflict with an express constitutional provision when read in concert with other provisions of Chapter 30 of Title 63, and, therefore, should not be declared unconstitutional. In addition, Appellants' claim is premature and is not ripe for judicial determination.

#### CONCLUSION

Respondent Davis County urges this Court to uphold the Summary Judgment granted by the trial Court for the reasons that Respondent Davis County is immune from suit for its failure to manage flood or storm waters or its failure to construct storm and flood water systems.

Respectfully Submitted this 31 day of  
March, 1989.

DAVIS COUNTY ATTORNEY

By   
Gerald E. Hess  
Chief Civil Deputy

#### CERTIFICATE OF MAILING

I hereby certify that on this 31 day of  
March, 1989, four true and correct copies of the foregoing Brief were mailed, postage prepaid, to:

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