

1990

Lewis Duncan, individually and as personal
representative of the Estate of PATRICK
DUNCAN, deceased, et al, v. Union Pacific
Railroad Company, the State of Utah, Paul
Kleinman : Unknown

Utah Supreme Court

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Recommended Citation

Legal Brief, *Duncan v. Union Pacific Railroad Company*, No. 900233.00 (Utah Supreme Court, 1990).
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April 22, 1991

FILED

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**CLERK SUPREME COURT,
UTAH**

Mr. Geoffrey J. Butler
Clerk of the Court
Utah Supreme Court
332 State Capital
Salt Lake City, Utah 84114

Re: Duncan, et al. v. Union Pacific Railroad and State
of Utah - Case No. 900233

Dear Mr. Butler:

In accord with Rule 24(j), Utah Rules of Appellate Procedure, Appellants/Plaintiffs submit their response to the supplemental filing of the State of Utah in the above proceeding. Specifically, at issue is if a recent United States Supreme Court opinion impacts on whether UDOT's decision on safety devices at the rail crossing constitutes policy-making (immune) or is operational in nature (not protected), and; if recent revisions to the Utah Governmental Immunity Act somehow shed light on the interaction between Utah Code Ann. § 63-30-8 and § 63-30-10.

Respondent State submits that United States v. Gaubert, 59 U.S.L.W. 4244 (March 26, 1991), a case under the Federal Tort Claims Act somehow upsets the delicate balance struck by the Utah Supreme Court as to whether any given decision by a governmental entity is immune policy-making or one for which immunity has been waived as being operational in nature. In so arguing, Respondent essentially asks the Court to overturn a long line of Utah cases rejecting immunity in light of the fact that the challenged decisions were operational. See, Doe v. Arquelles, 716 P.2d 279 (Utah 1985) and cases cited at 283, including Bigelow v. Ingersol, 618 P.2d 50 (Utah 1980).

Per this Utah authority, discussed at Point II.C of Appellant's Brief, the acts of UDOT in analyzing if a crossing deserves upgrades implement a pre-existing policy (established through enactment of the Manual on Uniform Traffic Control Devices), are wholly operational in nature and undeserving of

Mr. Geoffrey J. Butler
Clerk of the Court
Utah Supreme Court
April 22, 1991
Page 2

protection through discretionary function immunity. Considering this fact, even under Gaubert's expansive definition of "policy-making" there is substantial room to find that UDOT's determinations do not constitute the exercise of a discretionary function.

Respondent's contention that a recent amendment to § 63-30-8 warrants a decision in its favor must also be rejected. The amendment, which specifically subjects the immunity waiver for injury from defective highway conditions to a discretionary function exception, actually supports Appellant's arguments. The absence of a limitation on the immunity waiver in 63-30-8 is indicative of prior legislative intent that the waiver be unrestricted. There is nothing in the legislative history behind the amendment relied upon by Respondents to suggest anything other than a change of heart by the House and Senate.

Furthermore, adopting Respondent's argument carries with it the natural consequence of retroactive application of the amendment, something the statute expressly precludes. See also Irvine v. Salt Lake County, 785 P.2d 411 (Utah 1989) where the court refused to apply an amendment to the Governmental Immunity Act retroactively to bar a cause of action which had already arisen when the change went into effect. As such, the numerous Utah cases which have held that discretionary function immunity is not a modification to the waiver set forth in 63-30-8 still apply and mandate a ruling in Appellants favor.

Should the Court be in need of further assistance with respect to the above, please feel free to advise counsel.

Very truly yours,

BURBIDGE & MITCHELL



Michael A. Katz

MAK/aw
cc Allan L. Larson, Esq.
J. Clare Williams, Esq.
James R. Soper, Esq.