

1990

# Lewis Duncan v. Union Pacific Railroad Company; State of Utah; Paul Kleinman : Petition for Rehearing

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

900233

IN THE SUPREME COURT OF THE STATE OF UTAH

LEWIS DUNCAN, individually  
and as personal representative:  
of the Estate of Patrick  
Duncan, deceased, et al.

Plaintiffs/Petitioners

v.

UNION PACIFIC RAILROAD  
COMPANY, a corporation; STATE  
OF UTAH; PAUL KLEINMAN; and  
DOES 1 through 100,  
inclusive,

Defendants/Respondents.

Case No. 900233

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UTAH

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LEWIS DUNCAN, individually :  
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Plaintiffs/Petitioners respectfully submit their Petition for a Re-Hearing of the above appeal. In so doing, Plaintiffs certify that the Petition is presented in good faith, and not for purposes of delay, and in support of such certification note that two Justices of the Utah Supreme Court dissented from the majority opinion set forth in Duncan v. Union Pacific Railroad Co., No. 900233 (Utah April 6, 1992).

#### ARGUMENT

##### POINT I.

#### **THE COURT HAS OVERLOOKED OR MISAPPREHENDED ISSUES RAISED WITH RESPECT TO THE IMMUNITY OF UDOT.**

##### **A. Decisions as to Warning Devices at Railroad Crossings Are Not the Exercise of a "Governmental Function".**

As both Judge Stewart's dissenting opinion and Judge Jackson's concurrence in the Court of Appeals decision recognize, a decision on whether or not the State is immune initially hinges on whether or not the governmental activity constitutes the exercise of a governmental function. Under Standiford, the decision as to type of warning device at a railroad crossing is not the exercise of a governmental function, and no immunity exists regardless of whether or not such a duty is discretionary or operational. <sup>1</sup>

Traditionally, and in accord with a long line of Utah Supreme Court opinions, commencing with English v. Union Pacific Co., 45 P.

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<sup>1</sup> Standiford v. Salt Lake City Corp., 605 P.2d 1230 (Utah 1980).

47 (Utah 1896), the duty to place warning devices at railroad crossings has been borne by the railroad. Only with the passage of UTAH CODE ANN. § 54-4-15, et seq., was that responsibility assumed by the State, and even then, it was an obligation shared with the railroad, and more recently, the federal government. See, §§ 54-4-15.3 and 56-1-11 and 45 U.S.C. §§ 433 and 434. Consistent with Standiford, the fact the railroad has historically assumed responsibilities for warning devices at railway crossings shows this is not the exercise of "governmental function".

Standiford also enunciated the standards of interpretation to be applied in determining what is or is not a "governmental function". "The Act itself considerably broadens the extent of governmental tort liability", such that an activity is immune only if it "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". Id. at 1232 and 1235, respectively. Bearing in mind the important, perhaps revolutionary, principles which Standiford announced, the majority's reliance upon Valasquez v. Union Pacific Railroad Company, 469 P.2d 5 (Utah 1970) appears erroneous.

**B. Even if the Exercise of a "Governmental Function", a Decision as to Warning Devices at a Railroad Crossing Are Not the Exercise of a "Discretionary Function".**

In finding that UDOT's operations meet the four-step test for a discretionary function, as outlined in Little v. Utah State Division of Family Services, 667 P.2d 49 (Utah 1983), the majority overlooks in two very important respects precisely what UDOT does in determining whether a crossing deserves upgraded warning devices. In particular, UDOT does not, in reality, exercise a "basic policy evaluation judgment and expertise" in prioritizing crossings. Instead, our record is replete with testimony and other evidence from members of UDOT's own surveillance teams to the effect that a rigid mathematical formula is applied in prioritizing crossings. For a more extensive discussion of UDOT's "hazard index, see, generally, Appellant's brief at Pages 7-9. Further, UDOT acts in wholesale accord with the standards established in the Manual on Uniform Traffic Control Devices, portions of which are appended to Union Pacific's Brief.

It is the mechanical formula utilized in our instance which distinguishes UDOT's duties from those at issue in Rocky Mountain Thrift v. Salt Lake City, 789 P.2d 459 (Utah 1989), as relied upon by the majority. The design of a drainage system is nothing like measuring crossing angles, train and automobile speed and

automobile and train volume, or calculating predicted accident rates.

Even assuming the decision on whether to upgrade a crossing is the exercise of "discretionary function", the majority overlooks what actually occurred on our facts. Here, UDOT had re-evaluated the Drubey Road crossing in November of 1981, and the surveillance team recommended installation of automatic crossing signals. UDOT simply and tragically failed to implement this decision until after the fatal Duncan accident. As Justice Stewart so cogently observes, "implementation of a policy decision is an operational, not a discretionary, act, and, as such, is undeserving of the discretionary function protection". Slip Opinion at 13. Citing, Doe v. Arguelles, 716 P.2d 279, 282 (Utah 1985) and, importantly, Bigelow v. Ingersoll, 618 P.2d 50 (Utah 1980), involving the design of a traffic control system.

In view of this Court's recent pronouncements on discretionary function immunity, many of which involve highway or intersection warning signs, the majority's opinion appears to grossly overstate the precedential value of Valasquez. First, Valasquez predates the public policy considerations espoused in Standiford, that being a restriction of immunity and expansion of liability. While Standiford was admittedly not a "discretionary function" immunity

case, the policies there announced represent a departure from those applied in Valasquez.

The majority's attempts to distinguish Valasquez as to the exercise of a "discretionary function" from the trio of subsequent findings in Bigelow, Bowen and Richards overlooks the Court's own language in the more recent opinions. Particularly noteworthy here is the language of the unanimous court in Richards v. Leavitt, 716 P.2d 276 (Utah 1985). As recognized by Justices Stewart and Durham at Page 13 but ignored by the majority at Page 6, the installation of warning devices at a railroad crossing are clearly not the exercise of a discretionary function.

In Bigelow v. Ingersoll [citation omitted], where the plaintiff sued the governmental entity for the negligent design, construction and maintenance of a traffic light which caused their injuries, the state argued that the activity involved the discretionary function accepted from the waiver of immunity under U.C.A., 1953, §63-30-10(1). This quote supported the plaintiff's posture that that section did not modify the waiver of immunity governed by §63-30-8 and that the activities complained of did not involve decisions made at the basic plan-making level so as to render the state immune from suit.

716 P.2d 278. These petitioners must, once again, respectfully urge that under the discretionary function analysis consistently applied by this Court subsequent to the outdated Valasquez holding,



the state of Utah is not immune for any negligence incident to the conditions created at the Drubey Road crossing. <sup>2</sup>

C. The Majority Does Not Address Whether Discretionary Function Immunity Modifies the Waiver of Immunity under § 63-30-8.

An issue raised by Plaintiffs/Petitioners but not even addressed in the majority opinion is whether discretionary function immunity supersedes or can modify the wholesale immunity waiver set forth at 63-30-8 which 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.

As the above quote from Leavitt clearly states, discretionary function immunity does not affect or supplant the legislatures specific pronouncement that no immunity exists for dangerous road conditions, a phrase sufficiently broad enough to encompass hazardous railway crossings.

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<sup>2</sup> Yet another case recently rejecting discretionary function immunity for decisions as to railroad crossing device upgrades is Armjo v. Atchison Topeka & Santa Fe Ry. Co., 754 F. Supp. 1526 (D.N.M. 1990) and cases at 1533.

The Supreme Court's oversight in failing to make even a passing reference to this seemingly "on point" statute warrants a rehearing and a ruling in favor of Plaintiffs. <sup>3</sup>

**POINT II.**

**THE MAJORITY OPINION OVERLOOKS THE CUMULATIVE  
AFFECT OF ITS RULING AND THE REJECTION OF RECOGNIZED  
PUBLIC POLICY CONCERNS IT EFFECTUATES.**

As Justices Stewart and Durham's dissent notes, the current "result unjustly denies recovery to the Plaintiffs in this case and to all future plaintiffs who find themselves similarly situated". Slip Opinion at 18. While there are admittedly a few occasions where a plaintiff may be denied a recourse to the courts for negligently caused injuries, in general, the principle runs contrary to laudatory tort theories and public policy concerns such as compensating parties injured through no fault of their own and deterring hazardous conditions by holding negligent entities responsible for blameworthy conduct. The majority's failure to address, whatsoever, these important issues demands a rehearing.

Consistent with sound policy considerations behind the Governmental Immunity Act, this Court's recent opinions reveal an evolutionary process of upholding victims rights to recover while holding the state liable for dangerous conditions it helps create.

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<sup>3</sup>Interestingly enough, Valasquez does cite to 63-30-8 yet it also fails to resolve the apparent inconsistency between the two sections of the governmental immunity act.

See, generally, Condamarin v. University Hospital, 775 P.2d 348 (Utah 1989).

At the same time, this Court relieved railroads from traditional duties to answer for damages arising out of hazardous railroad crossings. Those facets of the majority's opinion are based, in part, on funding concerns. The state must exercise a policy decision to allocate scant resources to upgrade warning signals at crossings and yet Judge Halls' decision overlooks UDOT's ability to require the railroad to share in those costs or perhaps even shoulder the entire burden. See, UTAH CODE ANN. § 54-4-15.3. Lost in all these monetary considerations are the interests of survivors trying to compensate for the loss of fathers, mothers, children and the support, both emotional and financial they provide.

This powerful court has been presented with numerous, reasonable and well supported legal arguments which permit fulfilling the dual purposes of compensation and deterrence. The majority's decision overlooks the same.

### POINT III.

**THIS COURT OVERLOOKED OR MISAPPREHENDED A LARGE  
BODY OF LAW UPHOLDING RAILROAD'S DUTIES  
AS TO HAZARDOUS CROSSINGS REGARDLESS OF  
STATE AUTHORITY.**

Without citation to a single opinion definitively addressing the issue, this Court held that the authority of UDOT to determine

the type of warning device to be used at a railroad crossing superseded any long-standing duty of the railroad to protect the travelling public at a crossing. In doing so, the majority overlooked not only precedent from this jurisdiction but statutory authority as well.

While paying lip service to English v. Southern Pacific, supra, Justice Hall effectively overturns numerous Utah decisions imposing a common law duty on a railroad to exercise reasonable and due care, including providing appropriate safety devices at crossings. See, generally, Bridges v. Union Pacific Railroad, 488 P.2d 738 (Utah 1971) and the excellent discussion of this point at in Justice Stewart's dissent at Slip Opinion, Page 15. As Justice Stewart states, there is absolutely no reason the state's duty precludes the railroad from having a concurrent duty. Slip Opinion at 16. Not only is this consistent with prior Utah authority, it harmonizes applicable statutes as well. Compare § 54-4-15.1 (the Department of Transportation shall provide for installing and improving of safety devices at rail crossings) with § 56-1-11 ("Railroads shall be liable for damages caused by negligence to make and maintain good and sufficient crossings.").

Aside from the vague and inconsistent opinion of the Court of Appeals in Gleave, no Utah case exists addressing the railroad's duty of care in the face of UDOT's authority to enhance crossing

protection. What the majority overlooked is a substantial body of case law from other jurisdictions. Among those jurisdictions upholding a railroad's common law duty of care despite pervasive state regulatory authority in the field of train warning signals are: Florida, Seaboard Coastline Railroad Co. v. LouAllen, 479 So.2d 781 (Fla. App. 1985); Georgia, Southern Railway Co. v. Kraft, 373 S.E. 2d 774 (Ga. App. 1988); Illinois, Stromquist v. Burlington Northern, Inc., 444 N.E.2d 1113 (Ill. App. 1983); Indiana, Stevens v. Norfolk and Western Railway Co., 357 N.E.2d 1 (Ind. App. 1976); Iowa, Carl v. Burlington Northern Railroad Co., 880 F.2d 68 (8th Cir. 1989); Montana, Runkle v. Burlington Northern, 613 P.2d 982 (Mont. 1982); and a case construing New Jersey law, McMinn v. Consolidated Rail Corp., 716 F. Supp. 125 (S.D.N.Y. 1989). For a further discussion of these cases and in the interest of brevity, the Court's attention is directed to Plaintiff/Petitioner's Brief at Pages 16 through 19. By contrast to the well-reasoned authority Petitioners cited, Defendant Railroad was largely unable to produce anything on this point outside the realm of federal pre-emption under the Federal Rail Safety Act. See Union Pacific's brief at Page 31. <sup>4</sup>

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<sup>4</sup> As the railroad's federal pre-emption argument was not a basis for the majority's decision and in view of page limitations, no discussion thereon is contained herein. For an analysis of federal pre-emption, please see Petitioner's Reply Brief at Page 7 through 10. Notably, the railroad failed to plead federal pre-

One final argument the majority overlooks was the unworkable and unrealistic standard of care imposed on the railroad when one contrasts Gleave with this Court's ruling in Duncan. In Gleave, the Court of Appeals continued to uphold a duty of care on the part of the railroad to, for instance, keep their right-of-way clear of vegetation or other materials which might obstruct visibility. 749 P.2d 664. Now, this Court states the railroad has no duty with respect to warning devices. It is respectfully submitted that distinguishing between warning issues and visibility issues, particularly in view of the duties imposed upon the railroad to "make and maintain good and sufficient crossings", is a standard difficult for trial courts and counsel to apply.

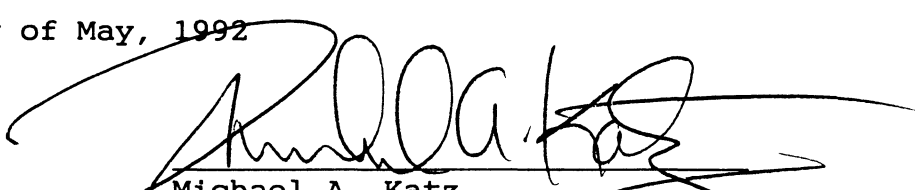
#### CONCLUSION

As Justices Stewart and Durham's well-reasoned dissent points out, the majority did not fully analyze the many important issues raised in our circumstances or has overlooked or misapprehended legal authority and public policy concerns. On that basis, Petitioners seek a rehearing of this appeal so as to enable those injured or killed at hazardous railway crossings recourse to the courts to recover damages they are justly entitled to.

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emption and consequently has waived this defense.

DATED this 27<sup>th</sup> day of May, 1992



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MAILING CERTIFICATE

I hereby certify that on the 27<sup>th</sup> day of May, 1992, I caused four true and correct copies of the foregoing PLAINTIFFS/PETITIONERS' PETITION FOR RE-HEARING to be mailed, postage prepaid, to the following:

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