

1990

Lewis Duncan, Patrick Duncan v. Union Pacific Railroad Company, The State of Utah, Paul Kleinman : Response to Petition for Rehearing

Utah Supreme Court

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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/
Appellants,

vs.

Case No. 900233

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

Defendants/
Respondents.

RESPONDENT STATE OF UTAH'S ANSWER TO APPELLANTS'
PETITION FOR REHEARING

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Pursuant to Rule 35A of the Utah Rules of Appellate Procedure, and the Supreme Court's Notice in this matter dated August 21, 1992, the respondent State of Utah, Utah Department of Transportation ("UDOT"), submits the following Answer to Appellants' Petition for Rehearing.

INTRODUCTION

This case involves an action for damages for the wrongful deaths of several persons who were killed when their car collided with a Union Pacific train. Suit was brought against the railroad for negligent operation of its train and maintenance of the crossing, and against the Utah Department of Transportation for not sooner having installed lights and gates. The crossing, along with hundreds of others in the State of Utah, had been the subject of an engineering study by the UDOT and was scheduled for eventual upgrade. Because of financial constraints, however, that crossing, and many others, had not been upgraded before the plaintiffs' accident.

After discovery, the District Court granted summary judgment in favor of the defendants, entering an extensive and well-reasoned Memorandum Opinion in support of the granting of the Motion for Summary Judgment.

Plaintiffs appealed to the Utah Court of Appeals which affirmed, Duncan v. Union Pacific, 790 P.2d 595 (Ut.App. 1990).

Plaintiffs petitioned the Utah Supreme Court for a Writ of Certiorari, which was granted. After briefing and argument, the

Utah Supreme Court on April 6 of this year affirmed (Justices Stewart and Durham dissenting).

The accident occurred in 1983; this case has been the subject of judicial scrutiny by the Utah courts for nearly a decade. After extensive discovery, briefing and argument, it has been decided by no fewer than seven Utah jurists that the plaintiffs are not entitled to recover.

There is, after all, something to be said for finality of judgments, and a rehearing in a case which has received as much attention as this one should rarely be granted in absence of some rather egregious judicial oversight. Thus, Rule 35, Utah Rules of Appellate Procedure, requires that a Petition for Rehearing "shall state with particularity the points of law or fact which the petitioner claims the Court has overlooked or misapprehended"

Appellants' Petition for Rehearing asserts that the majority of this court overlooked or misapprehended controlling law as it relates to: (1) whether decisions regarding traffic control devices at railroad crossings are the exercise of a governmental function; (2) whether the UDOT exercised "discretion"; (3) whether the waiver of immunity found in Section 63-30-8 is qualified by the discretionary function exception to the waiver of immunity in Section 63-30-10; and (4) whether the Court's opinion is inconsistent with what the plaintiff describes as "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 [governmental] entities responsible for the blameworthy conduct."

Contrary to appellants' assertions, however, the majority of this Court did indeed take note of the controlling law and relevant facts, and did not misapprehend or overlook either.

GOVERNMENTAL FUNCTION

The majority opinion properly concluded that decisions relating to the types of warning devices to be installed at railroad crossings involve the exercise of discretion, for which immunity is retained by Section 63-30-10(1) of the Governmental Immunity Act. To reach that conclusion, the court, of necessity, had to conclude that such activities were also the exercise of a "governmental function." Otherwise, the discretionary function question need not have been addressed.

Assuming that the issue was not waived by appellants, nevertheless the majority opinion acknowledged the issue and reached the proper conclusion, citing, inter alia, Richards v. Leavitt, 716 P.2d 276 (Utah 1985).¹ Standiford v. Salt Lake City Corp., 605 P.2d 1230 (Utah 1980), does not require a different result.

It is important to keep in mind that the Standiford test is a disjunctive proposition: the test for determining "governmental function" is "whether the activity under consideration is of such

¹Holding that the presentation of a timely Notice of Claim was required, which, of course, it would not have been if the activity in question (maintenance of traffic signs) was not "governmental."

a unique nature that it can only be performed by a governmental agency or that it is essential to the core of governmental activity." Arguably, decisions relating to upgrading railroad crossings are not "essential to the core of governmental activity."² However, it is clear that the activities involved herein are of such a unique nature that they can only be effectively performed, as a practical matter, by a governmental agency.

In interpreting the somewhat vague direction given by Standiford, subsequent decisions of this Court have made it clear that recreational activities, such as the operation of a golf course or a sledding hill, are not "governmental" (Standiford; Johnson v. Salt Lake City, 629 P.2d 432). The Court has also found activity to be not governmental when it is the type of activity which can be, and in fact is, carried out effectively by a nongovernmental agency such as, for example, supplying culinary water or collection of sewage (Bennett v. Bow Valley Development, 797 P.2d 419 (Utah 1990); Thomas v. Clearfield City, 642 P.2d 737 (1982)). In reaching those conclusions, the Court noted that there was nothing uniquely governmental about such activities, nor was it even mandatory that a governmental entity perform those functions. The same cannot be said, however, of the activities of

²Indeed, it is difficult to divine what sort of activity would be so "essential," short, perhaps, of collecting taxes and enacting, and enforcing laws.

the UDOT in the instant case. As noted by the Court of Appeals in Gleave v. Denver and Rio Grande, supra:

UDOT is statutorily empowered to "provide for the installing, maintaining, reconstructing, and improving of automatic and other safety appliances, signals or devices at grade crossings," Utah Code Annotated § 54-4-15.1 (1986), and to apportion costs of such projections among public and private entities, Utah Code Annotated, § 54-4-15.3 (1986). The government alone must consistently regulate safety devices at railroad crossings, determine which devices at which crossings should be recommended for federal funding, rank crossings in order of need for upgrading in light of limited funds for that purpose, and apportion signal installation costs between public and private entities. As a practical matter, the private sector cannot perform these functions. Accordingly, we hold that the regulation of public safety needs and the evaluation, installation, maintenance and improvement of safety signals or devices at railroad crossings is a governmental function immunized from suit under Section 63-30-3 of the Act. (Emphasis added.)

Neither the railroad nor any other nongovernmental entity has the power to determine what types of safety devices should be installed at railroad crossings. The mere fact that the UDOT may, within its discretion, require the railroad or some other involved entity to contribute toward the cost of the improvement does not detract from the fundamental doctrine, which is that activities and decisions which will impact on the citizenry at large, involve the prioritization of scarce financial resources, require consistency and uniformity, and deal with the safety of the traveling public, are, and must be, "governmental."

Certainly it is true that there are some activities engaged in by the government which are not "governmental functions," such as the operation of a golf course, the maintenance of a sewage

system, supervision of disbursement of escrow funds, and the maintenance of a water supply system, all of which activities can be, and are, engaged in by private individuals. One looks in vain, however, for private individuals and companies who are engaged in long-range urban and demographic projections, the planning of highway systems, condemnation of property, and design, construction, and maintenance of highways, bridges, interchanges, railroad crossings, and similar structures.³

This Court has both impliedly and expressly held that design, construction and maintenance of public thoroughfares is a governmental function. If such activities are not governmental, then the Court need never have discussed the necessity of a Notice of Claim, or whether the activity involved was "discretionary," as in Richards v. Leavitt, supra; Bigelow v. Ingersoll, 618 P.2d 50 (Utah 1980); Valesquez v. Union Pacific Railroad, 469 P.2d 5 (1970); Andrus v. State, 541 P.2d 1117 (Utah 1975); Carroll v. State Road Commission, 496 P.2d 888 (1972); Sears v. Southworth, 563 P.2d 192 (Utah 1977); See also, Niblock v. Salt Lake City, 111 P.2d 800 (Utah 1941); Hurley v. Town of Bingham, 228 P. 213 (Utah 1924).

Indeed, no other result is reasonable. To simplistically conclude that if some other entity could perform roughly the same function, that function is thus not "governmental," simply means

³The UDOT is responsible for approximately 43,000 miles of public highways in the State of Utah, which accommodate 14.6 billion vehicle miles of travel each year. UDOT Office of Policy and Systems Planning, Annual Statistical Summary (November 1991).

that there are virtually no activities of government which will be "governmental," as, obviously, nearly every activity which government undertakes could conceivably be undertaken by private persons. The fact that railroads may once upon a time have had more responsibility for the maintenance of crossings is irrelevant, as is the fact that in the early days of some states there were no public roads, but only private roads, for the use of which tolls were charged. Yet, in the real world, in twentieth-century Utah, the government has assumed, and the citizens expect, that government will be responsible, ultimately, for the State's highway transportation system. Clearly, the activity here at issue is "governmental," as it can only be, as a practical matter, performed by a governmental agency. Such conclusion is in no way contrary to the rationale of Standiford; the majority opinion reaches the correct and rational result, and is consistent with the Utah cases on the subject.

DISCRETIONARY FUNCTION

The majority of the Court neither overlooked nor misapprehended the facts or the controlling case law relating to the discretionary function issue. The majority opinion properly applied the four-part test of Little v. Department of Family Services, 667 P.2d 49 (Utah 1983), and found that a basic governmental objective was involved (the promotion of public safety at railroad crossings), that the activity (prioritization) was essential to the realization of the objective, that the UDOT

exercised basic policy evaluation, judgment and expertise, and that the UDOT, obviously, had the necessary statutory authority.

Appellants, however, continue to assert, as they did in their original brief, that the UDOT had decided to upgrade the crossing but "tragically failed to implement this decision" Appellants would, apparently, have this court believe that the UDOT, after deciding that the crossing needed to be immediately upgraded, simply sort of forgot to get around to doing what they had decided needed to be done immediately. Such is simply not the case. As was clearly established, the crossing in question was one of hundreds of crossings which were deserving of being upgraded. After an engineering study and a comparison of railroad crossings in the state needing improvement, this particular crossing was not rated high enough on the priority list so that it would be upgraded before the accident. To contend that deferring the upgrading of this particular crossing until other, more deserving, crossings had been upgraded constituted a negligent "failure to implement" is, to be charitable, illogical.⁴

⁴The following example may be helpful in illustrating the logical flaw in appellants' argument. First, it must be remembered that every railroad crossing is "dangerous" to some degree, as is every highway, be it two-lane rural road or state-of-the-art Interstate. Interstate highways are, presumably, safer than two-lane rural highways, and a railroad crossing with train-activated gates and lights is, presumably, safer than a crossing which has only the standard warning devices as were present in the instant case. Assuming that the UDOT has long-range plans, but no present funding, to upgrade two-lane highways to Interstate standards, is the UDOT to be held accountable for a head-on accident on a two-lane road because a decision was made to construct the Interstate in one area as opposed to the area where the accident occurred? Appellants apparently so contend.

While appellants contend that the Court ignored or overlooked relevant authority in concluding that the UDOT's activities under attack herein were "discretionary," it is respectfully submitted that the majority of the Court properly applied the controlling Utah cases. The Utah courts, over the years, have attempted to set forth what types of activities are discretionary and which are nondiscretionary. It has been held that the following decisions are "nondiscretionary": to use an earthen berm as the sole method of warning travelers of a cut in an abandoned road (Carroll v. State Road Commission, supra); preparation of plans and specifications and supervision of the manner in which construction work was carried out (Andrus v. State, supra); psychiatric care of an individual (Frank v. State, 613 P.2d 517 (Utah 1980)); installation of defective traffic control semaphore system (Bigelow v. Ingersoll, supra); negligent operation of a backhoe (Irvine v. Salt Lake County, 123 U.A.R. 11 (1989)). On the other hand, the following types of decisions have been held to be discretionary: decisions to build a highway and the general location thereof (Andrus v. State, supra); decisions regarding the design, capacity and construction of a flood control system (Rocky Mountain Thrift v. Salt Lake City, 784 P.2d 459 (Utah 1989)); decisions relating to when to release a prisoner on work release (Epting v. State, 546 P.2d 242 (Utah 1976)); the decision to require health inspections (Wilcox v. Salt Lake City, 484 P.2d 78 (Utah 1971)); failure to close a business under the Occupational Health and Safety Laws (White v. State, 579 P.2d 921 (1978)); and, of course, decisions

relating to installation of traffic control devices at railroad crossings (Valesquez v. Union Pacific Railroad, supra; Gleave v. Denver and Rio Grande, 749 P.2d 660 (Ut.App. 1988); Duncan v. Union Pacific Railroad, 790 P.2d 595 (Ut.App. 1990)).

Appellants argue that Rocky Mountain Thrift v. Salt Lake City, supra, is not controlling, since the design of a flood control system is unlike the decisions made by the UDOT in the instant case relating to prioritization of railroad crossings. Appellants' primary criticism is that the UDOT's surveillance team applied a "rigid mathematical formula . . . in prioritizing crossings," and that the use of the formula in some fashion distinguishes this case from Rocky Mountain Thrift v. Salt Lake City, supra. However, the UDOT should not be criticized for using an objective formula, regardless of whether it was rigid or mechanical. The use of such a formula attempts, to the extent possible, to reach rational, cost-effective conclusions based upon objective facts. As the majority opinion noted, "[T]he public is better served by a system such as that devised by UDOT, which takes into consideration all the crossings in Utah."⁵

⁵Appellants cite a Federal District Court case as an example of yet another case rejecting the discretionary function immunity for decisions relating to railroad crossing devices, citing Armjo v. Atchison, Topeka and Santa Fe Railway Company, 754 F.Supp. 1526 (D.C. N.M. 1990). That case, however, is totally irrelevant as interpreting dissimilar provisions of the New Mexico Governmental Immunity Act. Based upon the peculiar provisions thereof, the Federal Court merely observed that "from the Court's cursory look at this issue, it appears that the State of New Mexico would probably not enjoy sovereign immunity for these claims." In any event, the State of New Mexico was not even a party to the action, and the primary issue was the preemptive effect of the Federal Railroad Safety Act.

Presumably, appellants would not be happy with any formula, rigid or otherwise, unless that particular formula had moved the crossing in question to the top of the priority list. There is, of course, no assurance that such would have occurred no matter what formula was used, and the appellants' argument is dependent on speculation and twenty-twenty hindsight. The majority opinion reached the right conclusion. It is obvious that the activities of the UDOT herein complained of involve the rationing of scarce financial resources, the necessary prioritization of railroad crossing upgrading, and the exercise of basic policy evaluation, judgment and expertise in pursuit of a worthy, basic governmental objective.

In a perfect world, all railroad crossings would have been upgraded many years ago, and neither the plaintiffs' accident, nor any other similar accident, would ever have occurred. In the real world, with limited resources and a large number of railroad crossings, it is fundamentally unjust to impose liability on the UDOT simply because it did the best it could, using an objectively rational method, to prioritize railroad crossing upgrades. Plaintiffs, of course, merely argue that some other system should have been used, evidencing no concern that a premature upgrading of their crossing would delay upgrading somewhere else, and increase the possibility of another accident as bad or worse than the plaintiffs'.

A. The discretionary function exception of Section 63-30-10(1) modifies the waiver of immunity found in Section 63-30-8.

Appellants assert that Richards v. Leavitt, supra, stands for the notion that the waiver of immunity found in Section 8 for dangerous roads, bridges, etc., stands on its own and is not qualified by Section 10, which retains immunity for the exercise of a discretionary function. However, Richards v. Leavitt does not stand for the proposition claimed by appellants, and as noted by the majority opinion, held only that the maintenance of an intersection and a stop sign were governmental functions, and a timely notice of claim was required under the Governmental Immunity Act; the question of discretionary function was not reached.

A number of cases, however, have assumed that the discretionary function exception to liability will apply in claims involving an alleged dangerous road or highway. If Section 10 does not qualify Section 8, then there was no reason for this Court to discuss what is, and what is not, a discretionary function in, for example, Andrus v. State, Bigelow v. Ingersoll, Valesquez v. Union Pacific Railroad, Carroll v. State Road Commission, or Rocky Mountain Thrift v. Salt Lake City, supra.

The majority opinion did not misapprehend or overlook the controlling authorities and, indeed, properly applied the established law of this state. In any event, if there was ever any doubt that Section 10 was meant to qualify Section 8, those doubts have been laid to rest by the 1991 clarification of

Section 8 which now specifically provides that it is qualified by the "exceptions to waiver set forth in Section 63-3-10."

- B. The majority opinion does not overlook the cumulative effect of its ruling, and it is consistent with public policy.

Appellants' argument in Point II of the Petition for Rehearing is simply an appeal to emotion. It portrays the plaintiffs as victims: widows and orphans simply seeking just compensation for their emotional and financial loss from the State and a big railroad company for dangerous conditions "intentionally created because of monetary considerations." It is asserted that the result "unjustly denies recovery to the plaintiffs and to all future plaintiffs who find themselves similarly situated." While it is true that recovery will be denied to the plaintiffs herein, such a result is not necessarily "unjust." Appellants seem to forget that this unfortunate accident occurred only after the plaintiffs' vehicle drove onto the main line of the Union Pacific Railroad after disregarding warning signs which were visible in their headlights for at least one-half mile; further, that the train which struck the plaintiffs' vehicle could have been seen up the track for many thousands of feet and, in addition, was displaying a 300,000-candlepower headlight and a rotary beam on the top of the engine. A driver as apparently inattentive as the plaintiffs' driver may very likely not have been saved by the enhanced warning system for which the plaintiffs so earnestly contend.

Under the circumstances of this case, it is not unjust to relieve the UDOT of liability to the plaintiffs. Indeed, the injustice would be to impose liability on the UDOT and the taxpayers of this state merely because the UDOT, through the application of an objective engineering study, determined that there were other railroad crossings more in need of expensive gates and lights than the one at which the subject accident occurred.

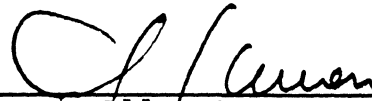
CONCLUSION

There is no basis for the granting of the appellants' Petition for Rehearing. A rehearing is only appropriate if in fact the Court has overlooked or misapprehended some relevant points of law or fact. The majority opinion accurately stated the fundamental facts and applied well-established law. Appellants' Petition for Rehearing is merely a rehash of arguments previously made, enhanced by some quotes from the dissenting opinion. The Petition for Rehearing does not set forth any valid reason for subjecting the parties and the Court to yet more briefing and argument. The Petition should be denied.

DATED this 8th day of September, 1992.

SNOW, CHRISTENSEN & MARTINEAU

By



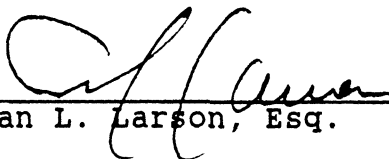
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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of September, 1992,
I delivered via United States mail, postage prepaid, four copies
of Respondent State of Utah's Answer to Appellants' Petition for
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