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Albert Sandberg v. Lehman, Jensen and Donahue, L.C., a Utah limited liability company : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ALBERT SANDBERG, Plaintiff/Appellant, vs. LEHMAN, JENSEN & DONAHUE, L.C., a Utah limited liability company, Defendant/Appellee.	Case No. 20020101-CA

BRIEF OF APPELLANT

**APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH
HONORABLE MICHAEL K. BURTON, DISTRICT JUDGE
CIVIL NO. 000908925**

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JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(j), as this matter was appealed to the Utah Supreme Court from a final judgment of the Third District Court, and the appeal was transferred by the Utah Supreme Court to this Court. (Order Transferring Appeal, R. 1080-81.)

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Issues

1. Whether the trial court erred in granting summary judgment, dismissing Plaintiff/Appellant Albert Sandberg's legal malpractice claim against Defendant/Appellee Lehman, Jensen & Donahue, L.C., on the ground that the claim that Defendant neglected to file, a personal injury claim against Salt Lake City, would have been barred by the Governmental Immunity Act's discretionary function exception. (Plaintiff's Opposition to Defendant's Memorandum for Summary Judgment, R. 892-1007 (hereafter "Oppo. Mem.").)

This issue involves two sub-issues:

a. Whether the trial court erred in holding that the discretionary function exception of Utah Code Ann. § 63-30-10(1) would have applied to the claim against the City that Defendant failed to bring on Mr. Sandberg's behalf. (Oppo. Mem., R. 905-14.)

b. Whether the trial court erred in refusing to hold that barring Mr. Sandberg's claim against the City under the Act would have violated article I, section 11 of the Utah Constitution. (Oppo. Mem., R. 914-17.)

Standard of Review

In reviewing a trial court's grant of summary judgment, all facts and inferences are viewed in a light most favorable to the nonmoving party (Mr. Sandberg), and no deference is given to the trial court's ruling. E.g., Coulter & Smith, Ltd. v. Russell, 966 P.2d 852, 856 (Utah 1998); Badger v. Brooklyn Canal Co., 922 P.2d 745, 748 (Utah 1996).

DETERMINATIVE PROVISIONS

Utah Const. art. I, § 11:

> All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Utah Code Ann. § 63-30-9:

> Unless the injury arises out of one or more of the exceptions to waiver set forth in Section 63-30-10, immunity from suit of all governmental entities is waived for any injury caused from a dangerous or defective condition of any public building, structure, dam, reservoir, or other public improvement.

Utah Code Ann. § 63-30-10:

> 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 arises out of, in connection with, or results from:
>
> (1) the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused . . . .

STATEMENT OF THE CASE

Nature of the Case

This is a legal malpractice claim by Mr. Sandberg against Defendant, Mr. Sandberg's former counsel, for failing to timely file Mr. Sandberg's personal injury claim against Salt Lake City. Mr. Sandberg was injured when he fell into an unguarded five-foot-deep concrete pit while using the Salt Lake Valley Landfill, and he retained Defendant to represent him. Defendant sued Salt Lake County and received a $100,000 settlement, but Defendant neglected to file a claim against Salt Lake City, which designed and co-owned the Facility, and the time to file such a claim expired. Mr. Sandberg asserts that the City was negligent in failing to have a safety chain or other barrier along the edge of the pit and in maintaining a dangerously narrow sidewalk along the pit.

Course of Proceedings.

Mr. Sandberg initiated this action on November 2, 2000, and demanded a jury trial on November 22, the day after Defendant answered. (Complaint, R. 1-6; Answer, R. 10-15; Jury Demand, R. 16-17.) On November 21, 2001, Defendant moved for summary judgment. (Motion for Summary Judgment, R. 123-26.) A hearing on the motion took place on January 10, 2002, at which the trial court verbally granted the motion. (Hearing Transcript, R. 1083.) The order dismissing the claim was entered on January 22, 2002. (Order Granting Defendant's Motion for Summary Judgment, R. 1072-74, Addendum Exhibit 1 hereto.) Mr. Sandberg's notice of appeal was filed January 31, 2002. (Notice of Appeal, R. 1075-77.)

Statement of Facts

A. Mr. Sandberg's Accident.

Plaintiff Albert Sandberg was severely injured on March 25, 1996, when he slipped and fell into the Citizens' Unloading Facility (the "Facility") at the Salt Lake Valley Solid Waste Facility (the "Landfill"). (Complaint ¶ 1, R. 1-2.) The Facility, which opened in approximately 1991, featured a central pit, with access roads on both sides, so that the Facility's users could drive up to the edge of the pit and dump their nonhazardous wastes, which would then be pushed out of the pit by front-end loaders and disposed of along with other waste dumped at the Landfill. (See Facility Diagram, R. 643, Addendum Exhibit 3; Photographs, R. 931, Addendum Exhibit 4.) A six-foot-wide sidewalk separated the driving surface from the edge of the pit, which left very little space for individuals to stand when unloading their vehicles, particularly when tailgates were lowered.[1] (Deposition of Bud Stanford, R. 940; Photographs; Expert Report, R. 869.) The edge of the dumping pit was completely unguarded by barricades, chains, or other features, even though the edge had a potential fall of five feet onto hard concrete. (Photographs; Expert Report.)

Not surprisingly, at least a dozen people were injured, some severely, by falling into the pit between 1992 and March 1996. (Summary of Dumping Pit Injuries, R. 929.) Another three people were injured in the summer of 1996, after which the sidewalk was widened to nine feet and a chain was installed to keep people from falling

[1] When the Facility was built, the sidewalk was three feet wide; it was widened to six feet sometime between 1991 and 1996. (Stanford Depo., R. 940.)

into the pit. (Injury Summary, R. 929; Stanford Depo., R. 937, 940-41, 951-52.) Since then, *not a single person has been significantly injured from falling into the pit.* (Stanford Depo., R. 947-48.) Accordingly, there is "no consideration . . . at all" to removing the chain. (Stanford Depo., R. 949.)

When Mr. Sandberg arrived at the Facility on March 25, he backed his truck up about a foot away from the curb, which left him less than two feet of room behind the open tailgate on his truck. (Deposition of Albert Sandberg at 33, 37, R. 843-44.) Mr. Sandberg was careful to avoid the edge, but his foot slipped on an icy patch of the sidewalk as he stepped out of the truck, and he fell into the pit, first landing hard on his feet and then hitting his head on the concrete floor. (Sandberg Depo. at 42-51, R. 845-47.) Mr. Sandberg's left heel bone was shattered, his left ankle was broken, and the cartilage in his right knee was destroyed. (Sandberg Depo. at 54-56, R. 848.) Mr. Sandberg has undergone no less than five surgeries to treat the injuries he sustained that day, including one procedure in which the ends of his toes were cut off and steel rods inserted into his toes, and he will require a knee replacement in the future. (Sandberg Depo. at 54-57, R. 848-49.)

B. The Construction and Operation of the Facility.

The Salt Lake Valley Solid Waste Management Council (the Council), the governing body that operates the Landfill and the Facility, was created in 1980 pursuant to an Interlocal Cooperation Agreement between Salt Lake City and Salt Lake County. (Interlocal Cooperation Agreement, R. 162-70.) The Council was made up of five members, including officials from the City and the County. (Agreement ¶ 2, R. 163.)

The Council was expressly directed to "plan, establish, and approve all construction and expansion projects for solid waste processing and disposal operations." (Agreement ¶ 8(D), R. 165.) The Council was further directed to "determine broad matters of policy" regarding the operation and management of waste disposal facilities, including "[r]eview[ing] and establish[ing] policy on all operations or activities that are major in nature and require policy determinations." (Agreement ¶¶ 8(E), 8(E)(7), R. 165.)

In the late 1980s, the County Public Works Department commissioned reports that recommended that a separate citizens' unloading/transfer station be added to the existing facilities at the Landfill. (Affidavit of Bud Logan Stanford ¶ 5, R. 195.)[2] In March 1990, the County Public Works Department formally recommended that such a facility be built. (Id. ¶ 6.) The engineering department of the Salt Lake City Public Works Department was therefore hired to design the facility; Paul Jara, a civil engineer, was in charge of the design. (Id. ¶¶ 11-12, R. 196.) Mr. Jara prepared a Design Report and other plans and diagrams based on his review of other facilities, consultation with an outside engineering firm (EMCON), and other factors. (Design Report, R. 632-768.)

The decision to build the Facility with a narrow sidewalk and with no chain or safety barrier along the edge of the open concrete pit was made primarily by Mr. Jara, the engineer working for the City, and Mr. Bud Stanford, who worked for the County Public Works Department, with no review or consideration by their superiors or other

[2] Among other things, the purpose of the citizens' unloading facility was to allow private citizens to dump their refuse at a different location than commercial haulers.

governmental bodies. Plans for the Facility were circulated and reviewed by various governmental and private actors, but these plans did not address whether chains or other safety barriers would be installed along the edge of the open concrete pit, nor did they specify how wide the sidewalk separating the pit from the driving surface would be. (See, e.g., Design Report, R. 632-768.) Nor did the plans discuss the pros and cons of sidewalk widths or safety barriers. (See id.) Even the diagrams of the pit wall included within the Design Report did not address sidewalk width or the existence or nonexistence of safety barriers. (See id. at R. 644-73.) To the contrary, the preliminary sketch of the Facility that was circulated to the review agencies appeared to show a wall along the edge of the pit. (Facility Diagram, R. 643, Add. Ex. 3.)

Similarly, plans for the Facility were discussed at review meetings, but neither safety chains nor sidewalk widths were addressed, neither the County Public Works Department nor the Council asked about such safety features, and no decision was made by the Public Works Department or the Council to omit such protective features. (See Stanford Depo., R. 936, 938-40, 953.) Instead, the matter was discussed once, in an informal conversation in the lunchroom after a meeting. Mr. Stanford later testified that these issues were "minute to minute details" with which the Landfill Council did not concern itself:

> A. . . . They [the Landfill Council] don't like to get into the minute to minute details. They leave that to us.
>
> Q. *Was this a minute to minute detail?*
>
> A. *These railings are, yeah. Something they don't get involved with.*

(Stanford Depo., R. 942 (emphasis added).)

There was also no Council review of or involvement in the decision to widen the sidewalks and install the safety chain after Mr. Sandberg and the three other persons were injured in the spring and summer of 1996. In fact, the City was not involved in that decision at all. Instead, Mr. Stanford, the operations manager at the Landfill, testified that "[w]e just did that on our own." (Stanford Depo., R. 941, 951-52.)

C. The Litigation Against the City and the County.

In April 1996, Mr. Sandberg retained Gordon Jensen, of the Defendant law firm to represent him in obtaining compensation for his injuries. (Complaint ¶ 2, R. 1-2; Sandberg Depo. at 96-100, R. 859-60.) Mr. Jensen filed a timely notice of claim on Mr. Sandberg's behalf with Salt Lake County, and when that claim was denied Mr. Jensen filed a complaint in Third District Court. (Complaint ¶ 4, R. 2; Sandberg Depo. at 103, R. 860.) Unfortunately, Mr. Jensen never filed a notice of claim with Salt Lake City, even though the City designed the Facility and co-owned and co-managed the Landfill with the County. (Complaint ¶¶ 5, 7, R. 2-3.)

Subsequently, Mr. Jensen died, and in the spring of 1999 Mr. Sandberg retained Anderson & Karrenberg to continue the representation. (Complaint ¶ 6, R. 2-3.) In August 1999, Anderson & Karrenberg filed a notice of claim with Salt Lake City, which was denied, and added the City as a defendant in the then-pending lawsuit against the County. (Id.) The claim against the City was dismissed with prejudice, however, for Mr. Sandberg's failure to comply with the notice of claim requirements of the Governmental Immunity Act. (Id.) In September 2000, Mr. Sandberg settled his

claim against the County for $100,000. (Id. ¶ 7, R. 3.) This amount represents less than half of the damages Mr. Sandberg sustained from his injuries, but Mr. Sandberg accepted the settlement because the County was seeking an allocation of fault to the City, which had designed and co-owned the Facility, and more than fifty percent of the fault would have likely been attributed to the City. (Id. ¶¶ 7-9, R. 3.) Thus, Mr. Sandberg is still substantially uncompensated for the injuries he sustained as a result of the City's negligent design and operation of the Facility. (Id. ¶¶ 8-9, R. 3.)

D. The Summary Judgment Proceedings Below.

Defendant moved for summary judgment, arguing that even if Defendant had acted negligently in failing to timely file a notice of claim with the City, such negligence did not proximately cause Mr. Sandberg any injury because the claim would have been barred under the discretionary function exception to the waivers of immunity included in the Utah Governmental Immunity Act.[3] (See generally Memorandum in Support of Motion for Summary Judgment ("Defendant's Memo."), R. 127-60.) To support its motion, Defendant submitted copies of the studies that had been done addressing the need for the Facility, Mr. Jara's Design Report and Calculations, and a report from EMCON, the outside engineering consulting firm that had been engaged to review the plans. (R. 162-92, 200-788.) Defendant also included correspondence and meeting minutes showing discussions of the Facility by various government and private

[3] Defendant also contended that the City had no duty to remove the ice that had accumulated on the sidewalk along the unguarded edge of the pit, and that Mr. Sandberg's claim against the City would have been limited to a maximum of $150,000 under the Act's damages cap. The trial court did not rule on these issues.

agencies. (R. 789-831.) Additionally, Defendant submitted affidavits and deposition testimony from Mr. Jara, Mr. Stanford, and Mr. Richard Haughey, the EMCON representative. (R. 194-98, 595-604, 790-92.)

Opposing the motion, Mr. Sandberg pointed out that in the hundreds of pages of studies, plans, reports, and correspondence, there was *no discussion whatsoever* of whether the Facility would have a chain or other safety features along the edge of the pit, or how wide the sidewalks would be, or the pros or cons of such safety features. (Oppo. Mem., R. 895-905.) Mr. Sandberg also explained that the existence or non-existence of safety features for users of the Facility was not discussed at any of the meetings in which the plans were reviewed, other than the conversation "sitting around having a donut after the meeting, something like that." (See Stanford Depo., R. 953.) Mr. Sandberg also noted that EMCON was not hired to review the proposed Facility's "safety features," but only the "traffic patterns and necessary safety features *for vehicles entering, unloading, and then leaving* the transfer station area." (City-EMCON Contract ¶ B, R. 772 (emphasis added).) Mr. Sandberg further pointed out that in fact, EMCON did not conduct a "detailed design review" of the Facility. (Id.)

Mr. Sandberg further argued that the discretionary function exception did not bar his claim against the City because (1) the decisions at issue, i.e., building and operating a facility with no safety barriers along the open pit and dangerously narrow sidewalks, were not essential to the realization of a basic governmental policy, and (2) the decisions were not the result of a basic policy evaluation at the immunized policy-making governmental level. (Oppo. Mem., R. 905-14.) Mr. Sandberg relied exten-

sively on Trujillo v. UDOT, 1999 UT App 227, 986 P.2d 752, in which the Utah Court of Appeals held that the discretionary function exception did not immunize UDOT's decision to use barrels instead of concrete barriers to separate oncoming traffic during a highway project.

Mr. Sandberg also asserted that even if the discretionary function exception applied to his claim, then the Act would violate the Utah Constitution, in particular the Open Courts provision. (Oppo. Mem., R. 914-17.) Mr. Sandberg explained that the City was engaged in a proprietary function in operating the Landfill, as (1) such services are commonly provided by private entities, and (2) just like a private entity, the City and County charged fees for using the Landfill, which were used to fully pay for the operation of the Landfill.

In reply, Defendant argued that because the omission of safety barriers and the narrow sidewalks were part of the design of the Facility, they qualify as policy decisions entitled to protection under the Act. (See generally Reply Memorandum in Support of Defendant's Motion for Summary Judgment ("Reply Memo."), R. 1011-29.) Defendant further asserted that Mr. Jara had consciously weighed the pros and cons of the safety features at issue, and that his decisions were entitled to protection because the City had delegated to him the responsibility for making those decisions. Defendant did not really respond to Mr. Sandberg's constitutional argument, arguing instead that because the Act defines "governmental function" very broadly, operating the Landfill constitutes a governmental function under the Act even if it could be performed by pri-

vate entities, so the discretionary function exception applies. (See Reply Memo., R. 1022-25.)

The trial court held that the discretionary function exception barred Mr. Sandberg's claim against the City, and as such he could not prove that he suffered any damages due to Defendant's failure to pursue that claim. (See Hearing Tr., R. 1083, at 66-67, Addendum Exhibit 2.) The trial court essentially reasoned that the City had delegated to Mr. Jara the responsibility of designing the Facility, and Mr. Jara's decisions were therefore entitled to immunity. (Id. at 51-53.) The court also refused to hold the application of the Act unconstitutional in the present case, even though the court agreed that operation of the Landfill was a proprietary function, not a core governmental function, under the traditional test. (Id. at 66-67.)

This appeal followed.

SUMMARY OF ARGUMENT

The trial court's order granting summary judgment and dismissing Mr. Sandberg's legal malpractice claim against Defendant should be reversed. The court erred in holding that Mr. Sandberg's claim against the City would have been barred by the Act's discretionary function exception. Utah law establishes that the discretionary function exception does not apply to every governmental decision involving the exercise of discretion; instead, the exception is limited to "broad policy decisions" requiring evaluation of "basic governmental policy." The decisions at issue in the present case -- how wide the sidewalk should be and whether a safety chain should be put up along the

edge of an open pit -- simply do not fundamental policies and are not entitled to the protection of the discretionary function exception.

Utah case law holds that a governmental decision does not qualify for the discretionary function exception unless (a) the decision is essential to the realization of a basic governmental policy or objective, as opposed to a decision that would not change the course of that policy, and (b) the decision is the product of basic policy evaluation conducted at the "immunized policymaking level." Neither element is met here. First, as alluded to above, decisions as to how wide to make a sidewalk and whether to put up a chain are simply not essential to the realization of any basic governmental policy or objective. Instead, they are purely matters of customer convenience, which do not affect the course of the governmental policy at issue in the present case, namely, to facilitate the disposal of household waste. Indeed, that the sidewalk was widened and safety chains installed after Mr. Sandberg's injury demonstrates that these matters have little or no bearing on the Facility's primary purpose.

Attempting to avoid this fatal defect in its case, Defendant argues that because the narrow sidewalk and omission of the safety chain were part of the Facility's original design, those issues necessarily constitute fundamental policy matters. This is nonsense. The City's negligence goes beyond merely designing a building with inadequate safety features. Mr. Sandberg's claim against the City is for maintaining a dangerous building on the day he was injured, which includes not only building the Facility but also failing to correct the defects in the five years before Mr. Sandberg was hurt, even though a dozen people were injured there. Moreover, Utah authority rejects Defen-

dant's argument and holds that in determining whether the discretionary function exception applies, the proper focus is on the actual decision that led to the injury, not on the overall plan or "design" encompassing that decision. Thus, that the dangerous conditions were part of the Facility's original design does not mean that basic policy matters are involved.

Discretionary function immunity is also improper because Defendant did not establish that a conscious weighing of the pros and cons of omitting the pertinent safety features took place at the immunized policymaking level. Defendant submitted hundreds of pages of studies, plans, and correspondence regarding the construction of the Facility, but there is no discussion whatsoever about what safety features the Facility would or would not have or why those features should or should not be included. Defendant argues that the decisions were made by an engineer in the City's Public Works Department, who was "delegated" the responsibility for designing the Facility, but this actually *defeats* discretionary function immunity. Utah law is clear that if a decision is considered only by a lower level, non-policymaking employee, then the decision is not entitled to protection under the Act. Moreover, even if the City were entitled to immunity for the decisions the engineer made in *designing* the Facility, that still would not immunize the City from its failure to correct the safety defects *once users started falling into the pit*, and there is no evidence that anyone from the City consciously reviewed whether to improve the Facility's safety features after the Facility was built. Thus, discretionary function immunity simply does not apply.

Further, even if the Governmental Immunity Act were to be interpreted to bar Mr. Sandberg's claim against the City, such an interpretation would violate the Open Courts provision of the Utah Constitution. Operation of the Landfill is a proprietary function, not a governmental function, and as such Mr. Sandberg would have had a right to compensation for his injuries under the common law. Thus, the Governmental Immunity Act, if interpreted to bar his claim, would deprive Mr. Sandberg of a common law right of recovery. And because the Act gives Mr. Sandberg no alternative remedy and the deprivation of his rights is not necessary to fight a clear social or economic evil, such a deprivation would violate the Open Courts provision.

ARGUMENT

THE TRIAL COURT ERRED IN DISMISSING MR. SANDBERG'S MALPRACTICE CLAIM AGAINST DEFENDANT.

Mr. Sandberg initiated this malpractice action against Defendant for Defendant's negligent failure to pursue a claim against Salt Lake City for his injuries. The trial court dismissed Mr. Sandberg's claim on the ground that Mr. Sandberg purportedly would be unable to show that Defendant's failure to bring a claim against the City proximately caused him any injury, as any claim against the City would have been barred by the "discretionary function" exception of the Governmental Immunity Act, Utah Code Ann. § 63-30-10(1).[4] The judgment should be reversed.

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[4] Technically, the discretionary function doctrine operates as an exception to the Governmental Immunity Act's broad waivers of immunity. Mr. Sandberg's claim against the City should have been brought under Utah Code Ann. § 63-30-9, in which "immunity from suit for all governmental entities is waived for any injury caused from a dangerous or defective condition of any public building, structure, dam, reservoir, or

A. The trial court erred in holding that Mr. Sandberg's claims against the City would have been barred by the discretionary function exception.

The Governmental Immunity Act provides a limited immunity to governmental entities for injuries arising out of the exercise of discretionary functions:

> 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 arises out of, in connection with, or results from:
>
> (1) *the exercise or performance or the failure to exercise or perform a discretionary function*, whether or not the discretion is abused . . . .

Utah Code Ann. § 63-30-10 (emphasis added). Discretionary function immunity "was not designed to cloak the ancient doctrine of sovereign immunity in modern garb." Nelson v. Salt Lake City, 919 P.2d 568, 575 (Utah 1996). Instead, it is a "distinct, more limited form of immunity that should be applied only when a plaintiff is challenging a governmental decision that involves a *basic policy-making function.*" Id. (emphasis added). Accordingly, "[n]ot every governmental action involving discretion is a discretionary function within the meaning of the Act." Trujillo v. Utah Dep't of Trans., 1999 UT App 227, ¶ 21, 986 P.2d 752. Instead, discretionary function immunity is "limited to *broad policy decisions 'requiring evaluation of basic governmental policy matters*, not operational and ministerial acts." Healthcare Services, Inc. v. Utah Dep't of Health, 2002 UT 5, ¶ 28, 40 P.3d 591 (emphasis added) (quoting Hansen v. Salt Lake County, 794 P.2d 838, 846 (Utah 1990)).

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other public improvement," unless one of the exceptions set forth in § 63-30-10 applied. As set forth in the text, the discretionary function exception is included within

For the discretionary function exception to apply, the governmental entity must establish that the act in question satisfies each of the following criteria:

> (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?
>
> (2) Is the questioned 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?

Price v. National R.R. Passenger Corp., 2000 UT App 333, ¶ 38, 14 P.3d 702 (emphasis added) (quoting Trujillo ¶ 27).

Additionally, because this is an appeal from a grant of summary judgment, defendants face an even steeper burden. Under the Utah Rules of Civil Procedure, summary judgment is proper only if the moving party establishes "[1] that there is no genuine issue as to any material fact and [2] that the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(c). For summary judgment to be proper, the moving party must submit sufficient evidence or otherwise establish its right to judgment. The moving party has an "affirmative burden," Lamb v. B & B Amusements Corp., 869 P.2d 926, 929 (Utah 1993), and if the movant fails to demonstrate that no genuine issue of material fact exists, the motion must be denied. E.g., Badger

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§ 63-30-10.

v. Brooklyn Canal Co., 922 P.2d 745, 752 (Utah 1996) (because moving party's affidavit failed to negate existence of disputed issue of fact, nonmoving party had no burden to present evidence in response on that issue).

Defendant failed to satisfy the strict requirements of the discretionary function exception. In particular, Defendant failed to establish that the omission of safety features along the edge of the pit was essential to the realization of a basic governmental policy, program, or objective. Cf. Healthcare Services, 2002 UT 5, ¶ 28, 40 P.3d 591. Further, Defendant failed to present evidence establishing that a policy-making governmental body consciously weighed the risks and benefits of omitting the safety features at issue. At the very least, significant issues of fact exist, rendering summary judgment inappropriate.

1. Defendant failed to establish that the decisions to have a six-foot sidewalk and to omit a safety chain were "essential to the realization" of a basic governmental objective.

   a. Decisions such as whether to have safety chains or how wide a sidewalk should be would not change the course of the governmental policies furthered by the operation of the Landfill and the Facility.

To establish that Mr. Sandberg's claim against the City would have been barred under the discretionary function exception, Defendant was required to show that as a matter of law omitting a safety chain and keeping a narrow sidewalk were both essential to accomplishing a basic governmental objective:

> Is the questioned act, omission, or decision *essential to the realization or accomplishment of that [basic governmental] policy, program, or objective* as opposed to one *which would not change the course or direction of the policy, program, or objective*?

Keegan, 896 P.2d at 624 (quotation omitted). Defendant's claim fails because it is patently obvious that omitting the safety features at issue was not essential to accomplishing any basic governmental goal. Instead, the decisions regarding whether to have a chain or how wide the sidewalk should be are both decisions "which would not change the course or direction of the policy, program, or objective."

In its opening memorandum below, Defendant posited that the governmental policy at issue was "the disposition of public waste in a safe, environmentally sensitive manner that is convenient for citizens." (Defendant's Memo., R. 146.) Defendant presented no evidence, however, that omitting a safety chain was "essential" to achieving this goal, nor did Defendant present evidence that a narrow sidewalk was similarly essential. Because a party seeking summary judgment must show that it is entitled to judgment as a matter of law, Defendant's failure to demonstrate the importance of these conditions requires that the judgment be reversed.

In fact, the evidence establishes that the omission of adequate safety features was not essential to achieving the policy of providing for the safe and convenient disposition of public waste, *because the defects were corrected years ago and there is no evidence that the changes have prevented the fulfillment of the policy since then*. In 1996, after Mr. Sandberg's accident (and after three other people fell into the pit), a chain was installed and the sidewalk was widened to nine feet. (Stanford Depo., R. 948.) Defendant cited absolutely no evidence that these safety enhancements prevented the achievement of the Facility's purpose. In fact, ever since 1996 the Facility has been com-

mitted to keeping the safety chain in place, despite customer complaints. (See id. at R. 949 ("Q: Is there any consideration now to removing the chain? . . . [¶] A: "No. No. There is no consideration at that at all.").) If not having a safety chain were essential to the Facility's purposes, it is highly doubtful that the Facility would have kept the safety chain in place since 1996.

b. The decisions are not essential to realizing a basic governmental policy simply because they were part of the original designs for the Facility.

Notably, Defendant did not even attempt to argue below that building and keeping a narrow sidewalk and omitting a safety chain were essential to realizing a governmental objective. Instead, Defendant claimed that because these issues were "two of thousands of specific features of the overall design," they were automatically immunized by the discretionary function exception: "As part of the design, it is part of the policy making function." (Reply Memo., R. 1014-15.) Defendant further argued that "it is hard to imagine how the objective could have been accomplished at all without the design." (Defendant's Memo., R. 146.)

Defendant's "it's part of the design" argument misses the point for several reasons. First, *Mr. Sandberg's claim is not based simply on the "design" of the Facility.* Mr. Sandberg was injured because there was no safety chain when he used the Facility on March 25, 1996, and because the sidewalk was only six feet wide that day. Thus, Mr. Sandberg's injury resulted not only from the original construction of the Facility, but also from the City's failure to add a chain or sufficiently widen the sidewalk after the Facility was built.

Second, Defendant proffered no authority below for the proposition that the design of a building or project inherently involves basic policy decisions. To the contrary, the Utah Supreme Court appears to have *rejected* Defendant's argument. See Andrus v. State, 541 P.2d 1117 (Utah 1975). In Andrus, the design for the construction of the East Side Belt Route failed to provide for storm water drainage, and the plaintiffs' property flooded. The State relied on the discretionary function exception, but the supreme court rejected that argument, reasoning that "[t]he decision to build the highway and specifying its general location were discretionary functions, *but the preparing of plans and specifications and the supervision of the manner in which the work was carried out cannot be labeled discretionary functions*." Id. at 1120 (emphasis added).

Third, even if an overall "design" were considered a matter of basic governmental policy, that reasoning would not extend to every single aspect of that design. Instead, Utah authority establishes that in addressing a claim of discretionary function immunity, a court must focus on the particular decision that led to the plaintiff's injury. For example, in Trujillo, a case remarkably similar to the one at bar, this Court held that discretionary function immunity did not relieve UDOT of liability for injuries suffered as a result of an unsafe traffic control plan implemented as part of the I-84 reconstruction project in Weber Canyon. Trujillo, 1999 UT App 227, 986 P.2d 752.[5] While one side of the freeway was being rebuilt, traffic was routed onto the opposite side, requiring a "two-lane two-way operation." Id. ¶ 4. UDOT determined that plastic barrels instead of concrete barriers should be used to separate the opposing lanes

of traffic, and the plaintiffs were injured when an oncoming driver crossed through the barrels into their lane.

The plaintiffs asserted that UDOT should have used concrete barriers to separate the lanes, but the trial court granted summary judgment for UDOT under the discretionary function exception. This Court reversed. The Court recognized that the plan to use barrels for traffic separation was part of the overall plan for the entire I-84 project. Id. ¶ 5. Nevertheless, in addressing the discretionary function exception, the Court focused on the particular decision that led to the injuries, i.e., the decision to use barrels instead of barriers. Id. ¶¶ 31-33. In fact, the Court held that while the decision to rebuild the freeway was an immune discretionary function, the choice to use the barrels for traffic separation was not a discretionary function. The Court further stressed that in considering the applicability of the discretionary function doctrine, "[a]llegations that a governmental entity has been negligent must be separately examined to determine *if each act complained of* is an immunized discretionary function or is merely an operational or ministerial implementation of an already-established policy." Id. ¶ 23 (emphasis added).

Earlier authority, too, defeats Defendant's argument that decisions concerning safety features constitute basic policy decisions simply because those decisions may be made in the course of executing a larger overall plan or design. For example, in Carroll v. State Road Commission, 27 Utah 2d 384, 496 P.2d 888, 891-92 (1972), the Utah Supreme Court held that a road supervisor was not making a basic policy decision

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[5] A copy of Trujillo is attached as Addendum Exhibit 5.

when he decided to use berms as the sole means of warning drivers that a road was washed out; instead, the supervisor was engaged in "the operational level of decision making." Similarly, in Andrus, the court held that the state's design of a highway project and storm system as part of a reconstruction project were not discretionary functions. In both instances, as in Trujillo, the decisions at issue were encompassed within larger projects. And in both instances, the courts focused on the decisions that actually led to the injury. Thus, there is no basis for Defendant's argument that the focus of the discretionary function exception must be on the overall "design" of the Facility instead of on the failure to include adequate safety features both in the initial construction and after the Facility opened.

Finally, Defendant's argument that every single detail within the overall "design" of the Facility constitutes a broad policy matter is completely illogical, as shown by the following hypothetical. Suppose that engineering standards for a City-owned parking garage required the floors to be supported by posts at least two feet in diameter, but the City's engineers mistakenly designed one-foot support posts, and the floors collapsed. The width of support posts would undoubtedly be one of the "thousands of features" of the overall design of the garage. Yet it would be ludicrous to argue that the one-foot support posts were "essential to the realization or accomplishment of a basic governmental policy, program, or objective," Cf. Keegan, 896 P.2d at 624, simply because the posts were included in those plans. It is likewise ludicrous for Defendants to argue that the width of a sidewalk, or the existence or nonexistence of a

chain, is likewise essential to the realization or accomplishment of a basic governmental policy.

Accordingly, Defendants are wrong in claiming that "the design of the Facility" was essential to achieving the asserted policy of safe waste disposal, or that the policy could not have been achieved "without the design." A different design, e.g., one with chains and wider sidewalks, could have achieved the governmental policy (and have prevented Mr. Sandberg's injury). At any rate, the evidence certainly does not establish as a matter of law that decisions regarding the chain and the sidewalk width were essential to fulfill the purposes of the Facility.

c. The policies behind the discretionary function immunity would not be furthered by holding that the decisions at issue in the present case constitute basic governmental policy decisions.

The discretionary function exception, like governmental immunity in general, denies compensation to persons who have been injured as a result of another's negligence. The discretionary function exception is ordinarily justified, however, by the countervailing public policy notion that a government must be allowed to govern and that governing necessarily involves making policy decisions that should not be second-guessed by courts or individual litigants. As the court explained in Keegan, discretionary function immunity is designed "to shield those governmental acts and decisions impacting on large numbers of persons in a myriad of unforeseen ways from individual and class legal actions, the continual threat of which would make public administration all but impossible." Keegan, 896 P.2d at 623 (quotation and internal punctuation

omitted). The so-called "policies" furthered by the City's omission of safety features around the edge of the pit, however, do not involve "governmental" policies at all; they are primarily matters of customer convenience. Thus, there is nothing "governmental" about the decisions made regarding the safety features. In fact, these decisions are made by private businesses *every day*, and courts are perfectly competent to determine if such decisions were unreasonable and to award compensation where appropriate.

In other words, the decisions at issue in the present case are of a completely different nature than decisions like the one in Keegan, which involved whether to engage in a freeway construction project involving delays and inconvenience to every motorist who traveled down Parleys Canyon. Cf. Keegan, 896 P.2d at 624. Run-of-the-mill matters like whether to put up a chain or whether a sidewalk should be nine feet wide rather than six feet simply will not "impact[] large numbers of persons in a myriad of unforeseen ways." The bottom line is that the discretionary function exception is not intended to protect mundane decisions like the ones at issue in the present case, and allowing it to bar Mr. Sandberg's claim would be a gross injustice. Defendant therefore cannot show that Mr. Sandberg's claim against the City was barred by governmental immunity.

2. Defendant failed to establish that the decisions at issue required the actual exercise of basic policy evaluation at the immunized policy-making level.

Additionally, Defendant failed to present evidence below establishing that the decision to build a narrow sidewalk and omit safety chains resulted from "the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental

agency involved." Keegan, 896 P.2d at 624. To meet this element, Defendant must show that the decisions regarding the sidewalk and safety chains were "the result of serious and extensive policy evaluation, judgment, and expertise," and that a "conscious balancing of risks and advantages took place" at the "immunized policy-making level." Trujillo, 1999 UT App 227, ¶¶ 27, 33, 986 P.2d 752; Little v. Utah State Div. of Family Services, 667 P.2d 49, 51 (Utah 1983).

a. No one acting at a policy-making level considered whether to omit the safety features at issue in this case.

In Trujillo, this Court held that discretionary function immunity was not available to UDOT because UDOT failed to present evidence that the issue of whether to use barrels or concrete barriers for traffic separation was discussed at the immunized policy-making level. The Court noted that plans for the entire reconstruction project underwent extensive review:

> Plans for the entire I-84 project were drafted, formulated, and approved in a series of meetings and reviews over the course of approximately one year. Participants included Federal Highway Administration representatives; UDOT maintenance, engineering, design, and administrative personnel; and several city and county officials.

Trujillo, 1999 UT App 227, ¶ 5, 986 P.2d 752. The court also noted, however, that "the record contains no evidence *that the traffic control plan was ever specifically singled out for discussion, review, or approval at any point in the approval process.*" Id. (emphasis added).

The Court thus held that the discretionary function exception did not immunize UDOT's decision to separate traffic with barrels, even though both the project design

engineer and UDOT's Region One Design Engineer had engaged in discussions weighing the traffic separation options. The Court's reasoning is instructive:

> In this appeal, on the other hand, it is undisputed that the traffic control plan was formulated by an unlicensed UDOT staff engineer -- an employee who did not perform at the policy-making level. Further, while the record on appeal contains a general description of the multi-level approval process for plans and specifications pertaining to the I-84 resurfacing project, **UDOT's evidence does no more than establish that the traffic control plan *could* have been discussed in those meetings. UDOT does not point us to evidence that the traffic control plan and the barrels-versus-barriers decision was in fact the subject of intense scrutiny and review.** UDOT now characterizes the decision to use barrels as a "tough choice" between two traffic separation methods and now draws our attention to the relative risks and benefits of barrels and barriers. However, UDOT's evidence shows **these issues were addressed only in private discussions between the project design engineer who drafted the traffic control plan and UDOT's Region One Design Engineer.** These facts are insufficient to bring the formulation of the traffic control plan within the scope of discretionary function immunity.

Id. ¶ 31 (italics in original, bold added).

In holding discretionary immunity inapplicable, the Trujillo court distinguished Keegan, in which the Utah Supreme Court held that discretionary immunity protected UDOT's decision not to replace median barriers on I-80 in Parley's Canyon that violated relevant safety standards. Keegan, 896 P.2d 618. The barriers in Keegan originally complied with the standards, but two overlay projects raised the road level, effectively reducing the height of the barrier, and the plaintiff's husband was killed when his car climbed the barrier and slid into a bridge support. The Trujillo court pointed out that in Keegan, UDOT had gone through a detailed process in deciding not to raise the barrier, including a creating a safety study that "comprehensive[ly]" analyzed accident rates and a "cost-benefit report" that addressed numerous significant

factors such as the cost, the fact that the highway was to be redone in a few years anyway, the delays and inconvenience of an additional construction project, etc. Trujillo ¶ 30 (citing Keegan, 896 P.2d at 624). The study and report were compiled by senior engineers *and circulated and debated throughout UDOT.* Id. Trujillo noted that the decision not to raise the barriers in Keegan "'involved just the sort of policy-driven weighing of costs and benefits that the discretionary function exception was meant to protect.'" Id.

The case at bar is exactly on all fours with Trujillo. As in Trujillo, "the record contains no evidence that the [omission of safety measures] was ever specifically singled out for discussion, review, or approval at any point in the approval process." Trujillo ¶ 5. To the contrary, the evidence shows that the omission of safety features was not singled out for attention. In fact, in the entire six-inch stack of reports and plans Defendant filed to support its summary judgment motion, there is barely a mention of whether safety chains would be installed or how wide the sidewalks would be, and there appears to be no discussion of the costs and benefits of safety chains or sidewalk widths. Similarly, the safety features at issue were not considered at review meetings with the Public Works Department or the Council, and no decision was made by the Public Works Department or the Council to omit such features.

Instead, as in Trujillo, these issues were addressed, considered, and resolved by a staff engineer, Paul Jara, and there is no evidence to suggest that Mr. Jara was responsible for making governmental policy decisions. Mr. Jara was employed by Salt Lake City's Public Works Department, which had 108 employees, of which approxim-

ately ten to fifteen percent were engineers. (Jara Depo., R. 597.) Mr. Jara reported to the "engineering administrator" of his department, who in turn reported to the Public Works Director. (Id., R. 597-98.) Mr. Jara testified that Public Works was only one of "many" different engineering departments in Salt Lake City government. (Id.) Thus, as in Trujillo, the issue of whether to install a chain or how wide the sidewalk should be was discussed only by an employee "who did not perform at the policy-making level." Trujillo ¶ 31.[6]

That the Council never discussed the matters upon which Mr. Sandberg's claim against the City would have been based is fatal to Defendant's discretionary function argument, because it was the Council's role to "determine broad matters of policy regarding the operation and management of any solid waste processing and disposal facilities." (Interlocal Cooperation Agreement, R. 165.) As part of this function, the Council was specifically directed to "[r]eview and establish policy on all operations or activities that are major and nature and require policy determinations." (Id.) In other words, *the decisions at issue in the present case were not considered by the very body expressly charged with "determin[ing] broad matters of policy."*

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[6] Before the trial court, Defendant asserted that Mr. Jara was an "expert[] retained by these governmental bodies [the City and County] to make such decisions [concerning the sidewalks and safety chains]." (Reply Memo. at 6, R. 1016.) there is There is no indication, however, that Mr. Jara was any more of an "expert" than the engineer who designed the traffic control plan in Trujillo. Instead, like the engineer in Trujillo, Mr. Jara was an engineer already on the City's staff who happened to draw the assignment of designing the Facility. In fact, Mr. Jara had never designed a waste unloading facility prior to designing the one at issue in the present case. (Jara Depo., R. 603.)

b. The City cannot satisfy the "conscious weighing" requirement simply by "delegating" the decisions to a staff engineer.

Recognizing that the Council did not address the Facility's lack of safety features, Defendant instead argued (and the trial court ruled) that the Council did not need to discuss those matters, because those matters were left to Mr. Jara and Mr. Stanford to decide. This argument, however, directly contradicts Trujillo. In Trujillo, the issue of whether to use barriers or barrels to separate the traffic lanes was left to the staff engineer who designed the traffic control plan and the Region One Design Engineer with whom he discussed the matter. Trujillo, 1999 UT App 227 ¶ 31, 986 P.2d 752. But the court held that because the decision was not made at the "immunized policy-making level," the discretionary function exception did not apply. In other words, the fundamental principle to be derived from Trujillo is that if a decision can be left completely in the hands of a non-policymaking subordinate, then the decision is not entitled to the protection of the discretionary function exception.

That reasoning applies with full force to the present case. The Council, charged with determining policy matters, did not deem the issue of safety features to be important enough for the Council to be directly involved. As Mr. Stanford testified, "They [the Council] don't like to get into the minute to minute details," and chains and sidewalk widths were minute-to-minute details. (Stanford Depo., R. 942.) If the Council itself determined that the safety features were not important enough for the Council to be directly involved, then those decisions are not important enough to qualify under the discretionary function exception.

It is also significant that there was no policy level review of the decision to install safety chains and widen the sidewalks after Mr. Sandberg was injured. The Landfill Council had nothing to do with those matters; instead, "[w]e just did that on our own." (Stanford Depo., R. 937, 941, 951-52.) Once again, if the omission of safety chains and the narrow sidewalk resulted from extensive consideration by policy-making governmental entities, it is doubtful that those decisions could have been so easily overridden. Cf. Trujillo ¶ 34 n.4.

Just as in Trujillo, the decisions to omit safety chains and build a narrow sidewalk were made at the low-level engineering level and everyone else went along without independently addressing the issue. The omission of safety features may have been included in the plans that were approved by policy-making bodies, but there is nothing to suggest that those issues were singled out and specifically considered by the responsible parties. Accordingly, discretionary function immunity simply does not apply.

c. Even if Mr. Jara were acting in a policymaking position, summary judgment was still inappropriate because he did not consciously consider all of the acts and omissions that led to Mr. Sandberg's injury.

Moreover, even if the City were entitled to discretionary function immunity for decisions actually made by Mr. Jara, Mr. Sandberg still would have a claim against the City, because there is no evidence that Mr. Jara made any conscious decisions concerning safety at the Facility after it was built. Once again, Mr. Sandberg was not injured because the Facility was unreasonably dangerous when it opened; he was injured because the Facility was unreasonably dangerous *on March 25, 1996*. The unreason-

ably dangerous condition that led to Mr. Sandberg's injury resulted not only from the inadequate safety features in the original design, but also from the failure to add such safety features during the five years after the Facility opened, even though the potential for injury was obvious (see Photographs, R. 931, Add. Ex. 4) and even though a dozen people had been injured falling into the pit. Cf. Trujillo ¶ 34 (independently addressing "the negligent acts UDOT allegedly committed after the traffic control plan was in effect in the construction zone" and holding that those allegations of negligence "involve operational decisions on the part of UDOT").

The record contains no evidence that Mr. Jara was involved *at all* in any decisions regarding the Facility after it was built. (See Jara Aff. ¶¶ 1-7, R. 1034-36; Jara Depo., R. 595-604.) Thus, because there is no evidence that the failure to improve the safety features after the initial construction was the result of a "conscious weighing of pros and cons," even by Mr. Jara, Mr. Sandberg still would have had a claim against the City. Or more appropriately, because this is an appeal from a grant of summary judgment, Defendant has not established that Mr. Sandberg would not have had a claim against the City. Thus, it was error for the trial court to dismiss Mr. Sandberg's entire claim against Defendant.

B. Applying the Governmental Immunity Act to bar Mr. Sandberg's claims against the City would have violated the Utah Constitution, as the City was engaged in a proprietary function in owning and operating the Landfill.

Because the trial court erred in ruling that the discretionary function exception would have barred Mr. Sandberg's claim against Salt Lake City, Defendant's motion for summary judgment was improperly granted, and reversal is required. Reversal is

also required, however, because to the extent that the Governmental Immunity Act bars Mr. Sandberg's claim the Act violates article I, section 11 of the Utah Constitution.

Article I, section 11 of the Utah Constitution, the Open Courts provision, states in pertinent part that "[a]ll courts shall be open, *and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law.*" Utah Const. art. I, § 11 (emphasis added). Under this provision, "an individual [may] not be arbitrarily deprived of effective remedies designed to protect basic individual rights." Berry v. Beech Aircraft Corp., 717 P.2d 670, 675 (Utah 1985). Accordingly, where the legislature passes a statute that deprives a person of a remedy that existed at common law, the deprivation violates the Open Courts Provision unless (a) the legislative scheme provides an "effective and reasonable alternative remedy" for his injuries, or (b) abrogation of Mr. Sandberg's remedy is justified by a "clear social or economic evil." Id. at 680. In the present case, Mr. Sandberg has a common law right to recover compensation for his injuries because they resulted from the City's engagement in a proprietary function, not an essential governmental function. Further, Mr. Sandberg has no alternative remedy for his injuries, and abrogation of his remedy is not justified by a clear social or economic evil.

1. Denying Mr. Sandberg compensation for the injuries he sustained as a result of the City's negligent operation of the Facility would deprive Mr. Sandberg of rights existing at common law.

   a. Governmental immunity implicates a plaintiff's rights under the Open Courts provision unless the injury arises out of an essential governmental function.

The Utah Supreme Court has established that governmental immunity implicates rights protected by the Open Courts provision unless the immunized activity was a true governmental function: an activity "of such a unique nature that it can only be performed by a governmental agency" or an activity that is "essential to the core of governmental activity." See DeBry v. Noble, 889 P.2d 428, 440 (Utah 1995). If the activity at issue could just as easily be performed by a private entity, then the activity is considered "proprietary," for which a remedy existed under the common law, and abrogating the remedy by the Governmental Immunity Act would violate the Open Courts provision unless the abrogation were justified.

The "essential to the core of a governmental activity" test adopted in DeBry was originally formulated in Standiford v. Salt Lake City Corp., 605 P.2d 1230, 1236-37 (Utah 1980), which addressed the interpretation of the Governmental Immunity Act as it existed at the time. At that time, the Act provided governmental immunity only for the exercise of a "governmental function" but did not define what constituted such a function. In 1987, the legislature amended the Act to state that anything a governmental entity did was considered a "governmental function" for purposes of the Act.

In DeBry, however, the Utah Supreme Court held that the doctrine of sovereign immunity was limited by the Open Courts provision. The court recognized that while

Standiford was not interpreting the state constitution, the test derived in that case "drew a line between article I, section 11 interests and governmental immunity in a manner consistent with the underlying concept of governmental immunity as it existed at statehood." DeBry, 889 P.2d at 440. Accordingly, the court held that the Standiford test is the starting point for determining whether a particular application of sovereign immunity complies with article I, section 11. The court cautioned, however, that legislative determinations must be afforded a presumption of constitutionality. Id. The court further explained that "in applying the Standiford test, the Court must, among other things, evaluate whether the effect of tort liability would promote public safety or defeat essential or core governmental activities and programs that are critical to the protection of public safety and welfare." Id. (footnotes omitted).

b. The City's construction and operation of the Facility was not an essential governmental function.

Under the Standiford test, which is now the starting point for the constitutional analysis, the Utah Supreme Court has held that the maintenance and operation of a municipal sewer system was not a governmental function because such functions could also be provided by private parties. Thomas v. Clearfield City, 642 P.2d 737, 739 (Utah 1982). The court reasoned that "[e]ven assuming that the collection and disposal of sewage is most effectively, safely, and inexpensively performed by a governmental body, *we do not agree that these functions are uniquely governmental or essential to the core of its activity.*" Id. (emphasis added). The court expressly rejected the city's

argument that operation of a sewer was a core governmental function even though statutes authorized cities to provide sewer systems and enforce mandatory hookups.

As with the collection and disposal of municipal *sewage*, the collection and disposal of municipal *garbage* cannot be considered a uniquely governmental function nor a function essential to the core of governmental activity. Just as in Thomas, the Utah Code authorizes, but does not require, municipalities to provide solid waste management services:

> Subject to the powers and rules of the department, the governing body of each public entity *may*:
>
> (1) supervise and regulate the collection, transportation, and disposition of all solid waste generated within its jurisdiction; [and]
>
> (2) provide solid waste management facilities to handle adequately solid waste generated or existing without or without its jurisdiction . . . .

Utah Code Ann. § 19-6-503 (emphasis added).

Significantly, solid waste disposal services can and often are provided by private entities. According to Mr. Stanford, between 10 and 20 percent of municipal solid waste landfills are privately operated, and the trend has been that the number of private landfills is increasing while the number of publicly owned landfills is decreasing sharply. (See Stanford Depo., R. 943-44, 962-63.) The Environmental Protection Agency likewise reports that as of approximately 1992, private landfills accounted for more than *half* of the landfill market segment. (Environmental Protection Agency, Report to Congress: Flow Controls and Municipal Solid Waste, EPA Doc. 530-R-95-008, R. 982, 988.)

Utah law expressly authorizes the disposal of solid waste by private parties. The Utah Code states that any "person" may "own, construct, modify, or operate any facility or site for the purpose of disposing of nonhazardous solid waste" if approval for the facility is received. Utah Code Ann. § 19-6-108(3)(a). And in 1975, the Utah Supreme Court struck down a local ordinance that prohibited private parties from collecting or disposing of trash on a commercial basis. Parker v. Provo City Corp., 543 P.2d 769 (Utah 1975). Indeed, in 1988 the Landfill Council even considered privatizing its operation. (Landfill Evaluation and Privatization Study, R. 211-305.)

In other words, as designer, owner, and operator of the Landfill, Salt Lake City acts in a proprietary capacity, just like a private entity. Just like a private entity, the Landfill is not supported by tax revenues; instead, the Landfill charges fees to fund its operation and is designed to be (and is) financially self-sufficient. (See Stanford Depo., R. 945-47 ("All of the money to operate everything here comes from fees that we collect from users.").) Thus, under the Standiford test, as modified and applied in DeBry, operating the Facility is not a governmental function, and interpreting the Governmental Immunity Act to allow the City to escape liability for its negligence in designing and operating the Facility would have deprived Mr. Sandberg of a right that existed at common law.[7]

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[7] The Utah Supreme Court has recently held that UTA's operation of a public transportation ınstituted a governmental function under the traditional test, and as such application of the Act's damages cap did not violate the Open Courts provision. Parks v. UTA, 2002 UT 55, 449 Utah Adv. Rep. 12 (June 14, 2002). The court stressed that the vast majority of UTA's revenues came from public financing, and that UTA "is not self-supporting and would not survive on income from its revenue-producing activ-

Additionally, imposing tort liability on the City for its operation of the Landfill would certainly "promote public safety" and would not "defeat essential or core governmental activities or programs that are critical to the protection of the public safety and welfare." DeBry, 889 P.2d at 440. Holding the City liable for its negligence in designing, building, and operating the Facility would promote public safety for the same reasons that holding *any* defendant liable for its negligence promotes public safety: Making the City responsible for the costs of injuries caused by its own negligence will give the City an incentive to prevent accidents in the first place. And there is *no evidence whatsoever* to suggest that holding the City liable for its operation of the Landfill would defeat any essential or core governmental programs.

2. The deprivation of Mr. Sandberg's remedy for his injuries violates the Open Courts provision because no alternative remedy has been provided and such deprivation is not justified by a clear social evil.

Accordingly, under the holding in DeBry, Mr. Sandberg's right to recover compensation for the injuries he sustained as a result of the City's negligence in operating the Landfill is protected by article I, section 11 of the Utah Constitution. Thus, for the deprivation of that right to be proper, the defendant must show that (a) the legislative scheme provides an "effective and reasonable alternative remedy" for his injuries, or

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ities." Id. ¶¶ 10-13. The Court further noted that UTA was statutorily prohibited from competing with private businesses. Id. ¶ 13. In contrast, the Landfill is self-supporting, and there is nothing that prohibits the Landfill from competing with private companies for the solid waste disposal business. Thus, Parks does not affect Mr. Sandberg's argument that applying the Governmental Immunity Act to bar his claim would be unconstitutional.

(b) abrogation of Mr. Sandberg's remedy is justified by a "clear social or economic evil." Berry, 717 P.2d at 680 (Utah 1985).

The Governmental Immunity Act does not provide Mr. Sandberg with *any* alternative remedy for his injuries. Instead, like the statute of repose found unconstitutional in Berry, 717 P.2d 670, the Act (if the discretionary function were to apply) simply bars Mr. Sandberg's claim. The Act is unlike workers' compensation or no-fault insurance statutes, in which a right to a tort remedy is restricted in exchange for a right to recovery that is broader is scope but more limited in amount. Cf. Warren v. Melville, 937 P.2d 556, 558-63 (Utah Ct. App. 1997) (holding no-fault statute constitutional); Masich v. United States Smelting, Refining, and Mining Co., 113 Utah 101, 191 P.2d 612 (1948) (holding workers' compensation statute constitutional). Instead, Mr. Sandberg is simply left out in the cold, with absolutely no compensation for medical expenses, lost income, lost earning capacity, or pain and suffering.

Similarly, the record contains *no* evidence that abrogating Mr. Sandberg's right to compensation for his injuries is justified by any social or economic evil. Once again, because the City was in the same position as a private entity in building and operating the Facility, and because Mr. Sandberg's claim against the City is no different from an ordinary tort claim against a private business entity, it is difficult to imagine what evil *could* justify the complete abrogation of Mr. Sandberg's right to recover for the excruciating injuries he suffered at the Facility.

It is important to remember that this matter comes before the Court on an appeal from a grant of summary judgment. Thus, reversal is appropriate unless Defendant

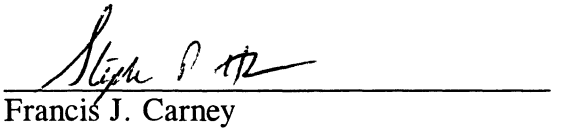
presented sufficient evidence to establish its right to judgment as a matter of law, and in making this determination, all factual issues must be resolved in Mr. Sandberg's favor. Mr. Sandberg respectfully submits that the current record certainly does *not* establish as a matter of law that Mr. Sandberg's claim against the City would have been barred, because at the very least, there are disputed issues of fact as to whether application of the Governmental Immunity Act to bar Mr. Sandberg's claim would have violated the Open Courts provision. Accordingly, even if the Court were to determine that the City's decisions in building and operating the Facility were covered by the discretionary function exception, summary judgment still would not be appropriate.

CONCLUSION

Plaintiff/appellant Albert Sandberg therefore respectfully requests that the Court vacate the Third District Court's grant of summary judgment dismissing his claims and asks that the Court remand the matter to the Third District Court for further proceedings.

DATED: July 16, 2002.

ANDERSON & KARRENBERG



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CERTIFICATE OF SERVICE

I certify that on the 10th day of July, 2002, two true and correct copies of **BRIEF OF APPELLANT** were served by first-class United States mail addressed to:

Matthew L. Lalli
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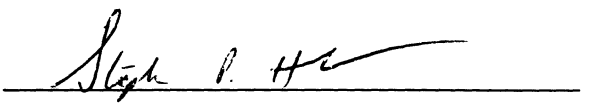

ADDENDUM

1. Order Granting Defendant's Motion for Summary Judgment, R. 1072-74.
2. Transcript of Hearing, January 10, 2002 (portions), R. 1083.
3. Preliminary Diagram of Facility, R. 643.
4. Photographs of Facility, R. 931.
5. Trujillo v. UDOT, 1999 UT App 227, 986 P.2d 752.

Exhibit 1

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Attorneys for Lehman, Jensen & Donahue, L.C.

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

ALBERT SANDBERG,

Plaintiff,

vs.

LEHMAN, JENSEN & DONAHUE, L.C., a Utah limited liability company,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Case No. 000908925

Honorable Michael K. Burton

Defendant Lehman, Jensen & Donahue, L.C.'s Motion for Summary Judgment came on for hearing on January 10, 2002. Defendant was represented by Christy L. Romero. Plaintiff Albert Sandberg was represented by Francis J. Carney. Argument was held.

Based upon the record of this matter and the argument at the hearing, and for the reasons set forth in the Motion for Summary Judgment and this Court's ruling at the hearing,

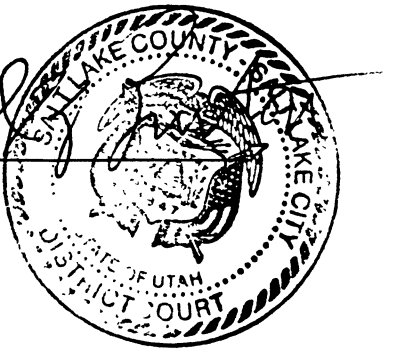
IT IS HEREBY ORDERED that

1. Defendant's Motion for Summary Judgment is granted.

2. All causes of action against Defendant are hereby dismissed with prejudice.

DATED this 17 day of January, 2002.

BY THE COURT:



Approved as to form:

Francis Carney 14 Jan 02

Francis J. Carney
Attorney for Plaintiff

CLERK'S CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and accurate copy of the foregoing, postage prepaid, on the ____ day of January, 2002:

Francis J. Carney, Esq.
Anderson & Karrenberg
50 West 300 South, Suite 700
Salt Lake City, Utah 84101

Matthew L. Lalli, Esq.
Christy L. Romero, Esq.
Snell & Wilmer L.L.P.
15 West South Temple, Suite 1200
Gateway Tower West
Salt Lake City, Utah 84101-1004

_____

Exhibit 2

20020101CA

IN THE THIRD JUDICIAL DISTRICT COURT

OF SALT LAKE COUNTY, STATE OF UTAH

ALBERT L. SANDBERG,	:	Case No. 000908925
Plaintiff,	:	
v	:	
LEHMAN, JENSEN & DONAHUE,	:	
Defendants.	:	

MOTION FOR SUMMARY JUDGMENT, JANUARY 10, 2002

BEFORE

THE HONORABLE MICHAEL K. BURTON

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
1775 East Ellen Way
Sandy, Utah 84092
801-523-1186

MR. CARNEY: Yeah. It says they may.

THE COURT: Yeah. It just says if you're going to do it —

MR. CARNEY: Yeah. And in fact there are profitable private dumps in Utah. There's a new one in Utah County. There's that big one down in Price.

THE COURT: Right.

MR. CARNEY: And —

THE COURT: Right. They're making lots of money, I'm told.

MR. CARNEY: I'm not going to discuss the ice on the sidewalk issue.

THE COURT: I would think that she doesn't win on that. I mean I don't mind throwing it out, but I wanted to hear them on that one. And in all candor, it seems to me she maybe has prevailed on the other, but that's okay. I have to be candid. But I think on the discretion, I'm convinced that there's a lot of discretion went in here, and that's what they meant.

MR. CARNEY: Well —

THE COURT: No. Not that you haven't ably stated the other side, but I mean that's my job here, to decide, well, were some policy makers involved. I'm happy they were. But go ahead. I mean I don't want to cut you off because I think your points, but for that one, all carry the day in my mind.

MR. CARNEY: Yeah. And I think —

THE COURT: And I guess it's a bummer because Horvat would have liked to have been here to argue it because he's the — but I guess it's an issue of level of policy decision making and who was given that job. I mean I can't imagine either the council that runs the dump or the Salt Lake City Council truly getting into the business of overseeing every aspect of a design. They delegate those things. To do so would be putting, in my mind, kind of a form over substance.

If they had to okay every idea, every city council would just okay what their engineers have done. They don't have enough expertise and/or time and/or inclination. So that's why we have the principle of delegating things, and so it strikes me that here Salt Lake City delegated it to this Jera and this Stanford, and Stanford and Jera obviously went on the — I mean they didn't pay their way to go to dumps. They went on the city's dime to look at those things.

So it seems to me that that was the policy that was intended. Look at it, weigh the pros and cons. They did, and so this to me is really a discretionary decision.

MR. CARNEY: To the level of summary judgment?

THE COURT: Well, if you — I mean it's a discretionary decision. They don't give up immunity. If they don't give up immunity, you can't sue them. If you can't sue them, Mr. Jensen didn't make an error in not bringing a claim

against them.

MR. CARNEY: All right.

THE COURT: Isn't that kind of the trail?

MR. CARNEY: Sure. That's the trail.

THE COURT: But I mean there is not going to be any believable evidence, is there, that they didn't consider it? If you get those two guys on, who's going to say — who in the world? I mean you don't have anybody. Such person doesn't exist.

MR. CARNEY: Well, what about —

THE COURT: Jera didn't think about it. Well, yeah, I did. I'm sorry. I did.

MR. CARNEY: Well, Jera was going to say that he —

THE COURT: Jera's going to say he did. Stanford's going to say he did, and that's going to be the only evidence the jury will have, right?

MR. CARNEY: And the evidence is going to be that no one else every considered it besides those two.

THE COURT: Right. And so then that becomes a legal question, right?

MR. CARNEY: Right.

THE COURT: Are those of a sufficient policy-making status that their decision is a governmental weighing of cost, benefits, carrying on a purpose, all those considerations? And it has to be a legal question, no matter how you get down to

it.

MR. CARNEY: Right.

THE COURT: I'm not going to give that to the jury. Is he on the hierarchy? Where do you place him? I think that's what it comes down to.

MR. CARNEY: Yeah. No, that is going to be your decision —

THE COURT: Right.

MR. CARNEY: — after hearing this.

THE COURT: And so I think, given the way this falls out, that he's the engineer and given the job to do this, that it is a discretionary function, for the reasons Ms. Romero has raised to me. I understand your view to the contrary, but I don't think in this case, with these facts, that I could come out any differently.

MR. CARNEY: And we would need a decision also on the constitutionality.

THE COURT: Do I have to do that? Because can't I do it like the appellate guys do and say, You know, I've got this one — and in truth this is what happened. I looked at it. I tore back and forth. I mean —

MR. CARNEY: I hate to make —

THE COURT: — I was jumping from side to side, you know.

MR. CARNEY: Well, in your —

THE COURT: That's a tough valley.

MS. ROMERO: — a lot of money. I mean this case has been going for some time now. I think that, you know, this is not — as I read their pleadings, I didn't read it to raise the constitutionality of the —

THE COURT: Let me go back. I think this is what I'll do. I'm going to grant the motion for the summary judgment on the part of the defendant on the basis that Sandberg couldn't have prevailed against Salt Lake City. Jensen's lawsuit wouldn't have gone anywhere because this would have been a discretionary function and they would have retained their immunity. And that the statute passed in '87 which overrode *Standiford*, changed the rules, it's constitutional. Because that's how I believe I'd come out, Mr. Carney.

MR. CARNEY: Okay.

THE COURT: And if it matters, if it's a benefit, if *Standiford* were in place, it was according to me in reviewing that today that I would have concluded that a landfill was not a core governmental function and it would not have been included under this umbrella.

So I guess those first three parts. Right. It's constitutional, the landfill is not a core government function, but under the laws it is today. This is a clear, in my mind, exercise of a high-level policy discretionary function that allows for the immunity to be retained.

Ms. Romero, is there something more you need before you draw me an order?

MS. ROMERO: No. I'll prepare an order and send it to Mr. Carney.

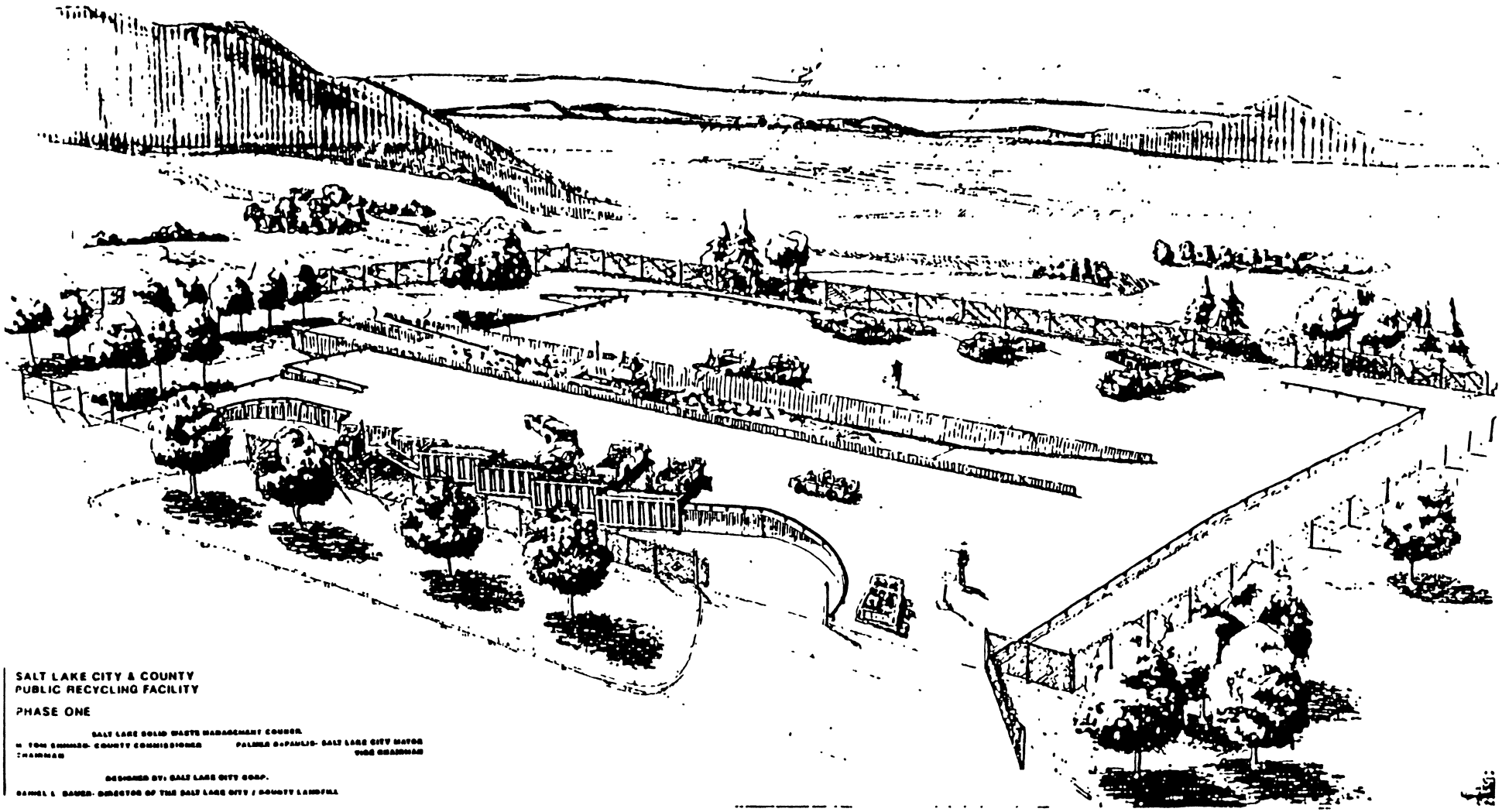
THE COURT: Okay. Anything more that we need to discuss right now?

MR. CARNEY: I don't think so.

THE COURT: Okay. Thank you both.

(WHEREUPON the hearing was concluded at 3:29 p.m.)

Exhibit 3



SALT LAKE CITY & COUNTY
PUBLIC RECYCLING FACILITY

PHASE ONE

SALT LAKE SOLID WASTE MANAGEMENT COUNCIL

H. TOM SHIMKO- COUNTY COMMISSIONER — CHAIRMAN

PALMER DePAULIS- SALT LAKE CITY MAYOR — VICE CHAIRMAN

DESIGNED BY: SALT LAKE CITY CORP.

DANIEL L. DAUER- DIRECTOR OF THE SALT LAKE CITY / COUNTY LANDFILL

Exhibit 4

EXHIBIT

B

Photo taken shortly after Sandberg's fall in April 1996

Photo taken after barriers were erected and sidewalk widened in late 1996

Exhibit 5

on Macris's claims for successor liability because disputed issues of material fact exist as to whether Neways was Images's successor. The rule for a claim based on successor liability is that

> where one company sells or otherwise transfers all its assets to another company the latter is not liable for the debts and liabilities of the transferor, except where: (1) the purchaser expressly or impliedly agrees to assume such debts; (2) the transaction amounts to a consolidation or merger of the seller and purchaser; (3) the purchasing corporation is merely a continuation of the selling corporation; or (4) the transaction is entered into fraudulently in order to escape liability for such debts.

Florom v. Elliott, 867 F.2d 570, 575, n. 2 (10th Cir.1989).

[8] ¶ 16 Although the trial court found that Neways was Images's successor, our review of the record reveals that disputed issues of material fact exist as to whether Neways had the same officers and directors as Images,[3] whether there was consideration for the transfer of assets from Images to Neways, and whether Images fraudulently transferred its assets to Neways to avoid paying Macris damages awarded in the first suit. Because material disputed facts exist, we conclude the trial court erred in granting summary judgment on Macris's claim for successor liability.

CONCLUSION

¶ 17 The facts giving rise to Macris's claim against Neways arose after Macris filed its amended complaint in the action against Images. As a result, the doctrine of claim *preclusion did not require Macris to litigate* its claims against Neways in the earlier action. Thus, the trial court erred in granting summary judgment in favor of Neways on Macris's claims for fraudulent transfer and alter ego. Moreover, because material disputed facts exist as to whether Neways was Images's successor, the trial court also erred in granting summary judgment in favor of Macris on its claims for successor liability. We therefore reverse and remand for proceedings consistent with this opinion.

¶ 18 WE CONCUR: RUSSELL W. BENCH, Judge, and JAMES Z. DAVIS, Judge

3. Neways admitted that it is Images's privy for purposes of Macris's motion for summary judgment. This admission, however, was made in opposition to Macris's motion for summary judgment, thus, Neways is not bound by this admission for purposes of the successor liability claim.

1999 UT App 227

Alan TRUJILLO and Sharon Trujillo, Plaintiffs and Appellants,

v.

UTAH DEPARTMENT OF TRANSPORTATION; Ball, Ball & Brosamer, Inc., a California corporation; and John Does I through X, Defendants and Appellees.

No. 981331–CA.

Court of Appeals of Utah.

July 22, 1999.

Motorists who were injured in head-on collision on stretch of interstate that was under construction sued Utah Department of Transportation and general contractor. The Third District Court, Salt Lake Department, Homer F. Wilkinson, J., granted summary judgment to defendants. Appeal was taken to Supreme Court, which transferred the matter. The Court of Appeals, Orme, held that: (1) UDOT's formulation of traffic control plan, including decision to use barrels rather *than concrete barriers to separate traffic* coming from opposing directions, was not a discretionary function so as to be immune from potential liability; (2) UDOT's alleged negligence in failing to reduce speed in construction zone as called for in traffic control plan, failing to investigate accidents, and failing to meaningfully consider corrective action in response to letter from contractor, did not fall within discretionary function exception;

(3) and questions of fact existed as to whether traffic control plan that was executed by general contractor was unreasonably dangerous, and as to whether contractor negligently executed that plan, precluding summary judgment for contractor.

Reversed and remanded.

Billings, J., concurred in result.

1. Appeal and Error ⇐934(1)

On appeal from summary judgment, Court of Appeals would state the fact in the light most favorable to appellants.

2. Judgment ⇐181(33)

Because negligence cases often require the drawing of inferences from the facts, which is properly done by juries rather than judges, summary judgment is appropriate in negligence cases only in the clearest instances.

3. States ⇐191.4(1)

"Sovereign immunity" precludes lawsuits against state governmental entities without the government's consent.

See publication Words and Phrases for other judicial constructions and definitions.

4. States ⇐112.1(2)

Determination of whether Governmental Immunity Act bars negligence claim against state involves three-step inquiry: first, whether governmental conduct at issue was a governmental function to which general grant of immunity applies; second, if the conduct is a governmental function, whether the Act waives immunity for injuries arising out of the particular governmental function at issue; and finally, even if immunity is otherwise waived, whether an exception applies that retains immunity for the exercise of that governmental function. U.C.A.1953, 63–30–3(1), 63–30–10.

5. Municipal Corporations ⇐728

Discretionary function exception to liability under Governmental Immunity Act serves two policies: it shields those governmental acts and decisions impacting on large numbers of people in a myriad of unforeseen ways from individual and class legal actions, the continual threat of which would make public administration all but impossible, and it preserves the autonomy of coordinate branches of government. U.C.A.1953, 63–30–3(1), 63–30–10.

6. Municipal Corporations ⇐728

Not every governmental action involving discretion is a discretionary function within the meaning of Governmental Immunity Act; only those decisions arising out of a governmental entity's basic policymaking function qualify for immunity under the discretionary function exception. U.C.A.1953, 63–30–10(1).

7. Municipal Corporations ⇐728

Governmental decisions that are the result of serious and extensive policy evaluation, judgment, and expertise in numerous areas of concern qualify as immune "discretionary functions" under Governmental Immunity Act. U.C.A.1953, 63–30–10(1).

See publication Words and Phrases for other judicial constructions and definitions.

8. Municipal Corporations ⇐728

In contrast to governmental decisions involving evaluation of broad policy factors, acts, and decisions at the operational level are not "discretionary functions" for purposes of the Governmental Immunity Act; therefore, while the formulation of policy is an immune discretionary function, the execution of already-formulated policies is not. U.C.A.1953, 63–30–10(1).

9. Municipal Corporations ⇐728

Allegations that a governmental entity has been negligent must be separately examined to determine if each act complained of is an immunized discretionary function or is merely an operational or ministerial implementation of already-established policy. U.C.A.1953, 63–30–3(1), 63–30–10(1).

10. Municipal Corporations ⇐742(4)

Immunity under Governmental Immunity Act is an affirmative defense which governmental defendant bears the burden of proving. U.C.A.1953, 63–30–3(1), 63–30–10(1).

11. Municipal Corporations ⇐728

If governmental defendant posits immunity to tort claim on an exercise of discretion, it must make a showing that a conscious balancing of risks and advantages took place. U.C.A.1953, 63–30–3(1), 63–30–10(1).

12. Courts ⇐97(6)

United States Supreme Court's interpretation of discretionary function exception in Federal Tort Claims Act is not binding on Utah Supreme Court's interpretation of the discretionary function exception in the Utah Governmental Immunity Act. 28 U.S.C.A. §§ 1346, 2671 et seq.; U.C.A.1953, 63–30–3(1), 63–30–10(1).

13. Municipal Corporations ⇐728

Governmental entity that asserts immunity to tort claim under discretionary function exception must satisfy four-part test: (1) challenged act, omission, or decision must necessarily involve a basic governmental policy, program, or objective; (2) questioned act, omission, or decision must be essential to realization or accomplishment of that policy, program, or objective; (3) act, omission, or decision must require exercise of basic policy evaluation, judgment, and expertise on part of governmental agency involved; and (4) agency involved must possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision. U.C.A.1953, 63–30–3(1), 63–30–10(1).

14. Judgment ⇐181(33)

Applicability of discretionary function exception to a tort claim against a governmental entity is a fact-intensive inquiry that, by its very nature, is not particularly amenable to summary judgment. U.C.A.1953, 63–30–3(1), 63–30–10(1).

15. Automobiles ⇐278

Formulation of traffic control plan by Utah Department of Transportation (UDOT) in connection with resurfacing of interstate highway, including decision to use barrels rather than concrete barriers to separate traffic coming from opposing directions, was not a discretionary function for purposes of immunity in action by motorists injured in head-on collision; traffic-control plan was formulated by an unlicensed UDOT staff engineer who did not perform at policy-making level, and UDOT failed to show that plan was the subject of intense scrutiny and review. U.C.A.1953, 63–30–3(1), 63–30–8, 63–30–10(1).

16. Automobiles ⇐277.1

Alleged negligence by Utah Department of Transportation in connection with resurfacing project for interstate highway, in failing to reduce speed in construction zone as called for in traffic control plan, failing to investigate accidents, and failing to meaningfully consider corrective action in response to letter from contractor raising safety concerns about traffic control plan, did not enjoy immunity under the discretionary function exception to tort claims by motorists injured in head-on collision; those alleged omissions involved operational decisions in the implementation of, or failure to implement, pre-established policy. U.C.A.1953, 63–30–3(1), 63–30–8, 63–30–10(1).

17. Judgment ⇐181(33)

Questions of fact existed as to whether state-designed traffic control plan that was executed by general contractor in connection with resurfacing of interstate highway was unreasonably dangerous, and as to whether contractor negligently executed that plan, precluding summary judgment for contractor in negligence action by motorists who were injured in head-on collision allegedly resulting from inadequate separation of traffic from opposing directions.

18. Negligence ⇐1205(7)

A contractor has a duty to perform the work required by its contract with that degree of care ordinarily possessed and exercised by other contractors doing the same or similar work in the same locality.

19. Negligence ⇐1205(7)

Contractor is not liable if it has merely carried out the plans, specifications, and directions given it, since in that case the responsibility is assumed by the employer, at least when the plans are not so obviously dangerous that no reasonable person would follow them.

20. Judgment ⇐185.3(21)

Lack of evidence specifically describing as unreasonably dangerous a state-designed traffic control plan executed by contractor during highway resurfacing project was inconsequential to determining contractor's potential liability, on its motion for summary judgment, in action by motorists who were injured in head-on collision; no witness could properly give that opinion since it involved an ultimate question for the jury.

21. Judgment ⇐185(5)

Trial courts must avoid weighing evidence and assessing credibility when ruling on motions for summary judgment.

22. Judgment ⇐181(33)

Juries are uniquely qualified to judge whether conduct falls above or below the standard of reasonable conduct deemed to have been set by the community, and therefore issues of reasonableness and negligence should not be decided on summary judgment except when the applicable standard of care is fixed by law and reasonable minds could reach but one conclusion as to the defendant's negligence under the circumstances.

23. Negligence ⇐1713

Issue of proximate cause is a question of fact for the jury to determine in all but the clearest cases.

Gary B. Ferguson, Williams& Hunt, Salt Lake City, for Appellants.

Mark J. Williams, Plant, Wallace, Christensen & Kanell and Stephen P. Horvat, Anderson & Karrenberg, Salt Lake City, for Appellee Utah Department of Transportation.

Stephen G. Morgan and Joseph E. Minnock, Morgan, Meyer and Rice, Salt Lake City, for Appellee Ball, Ball & Brosamer.

Before BILLINGS, JACKSON, and ORME, JJ.

OPINION

ORME, Judge:

¶ 1 Alan and Sharon Trujillo appeal the trial court's grant of summary judgment in favor of defendants Utah Department of Transportation (UDOT) and Ball, Ball and Brosamer, Inc. (Ball). The Trujillos were injured in a traffic accident on a stretch of I–84 then under construction. The Trujillos challenge the trial court's rulings that the "discretionary function" variant of governmental immunity shields UDOT from liability and that the general contractor, Ball, is not liable to the Trujillos because it followed plans and specifications that were not unreasonably dangerous. The Trujillos' points are well-taken, and we reverse.

BACKGROUND

[1] ¶ 2 Because they appeal from summary judgment against them, we state the facts in the light most favorable to the Trujillos. *See Ledfors v. Emery County Sch. Dist.*, 849 P.2d 1162, 1162 (Utah 1993).

¶ 3 On September 24, 1995, the Trujillos were driving eastbound on a winding, two-lane stretch of I–84 through Weber Canyon when a westbound pick-up truck veered into their lane and collided head-on with their motor home. The Trujillos suffered serious permanent injuries from the accident, and the driver of the pick-up died at the scene.

¶ 4 I–84 is normally a four-lane, divided highway. However, at the time of the accident, the two eastbound lanes on the stretch of road where the accident occurred were closed for road resurfacing. Consequently, both directions of traffic had been channeled onto the two previously westbound lanes. Diversion of both directions of traffic onto two contiguous lanes is known as two-lane, two-way operations (TLTWO). The two lanes of the TLTWO were each ten to twelve feet wide with only two feet between them. Double yellow lines painted on the road surface and hollow plastic barrels spaced at 100–foot intervals divided the traffic flowing in opposite directions.

¶ 5 Traffic in the construction zone had been redirected pursuant to a traffic control plan designed by UDOT and implemented by

Ball. Plans for the entire I–84 project were drafted, formulated, and approved in a series of meetings and reviews over the course of approximately one year. Participants included Federal Highway Administration representatives; UDOT maintenance, engineering, design, and administrative personnel; and several city and county officials. However, although deposition testimony indicates that two UDOT engineers discussed the traffic control plan's separation of the two lanes, the record contains no evidence that the traffic control plan was ever specifically singled out for discussion, review, or approval at any point in the approval process.

¶ 6 As general contractor, Ball was contractually responsible for supervision of traffic control in the construction zone. Ball's contract with UDOT also required it to propose an alternate traffic control plan if it found UDOT's plan to be unsafe or inadequate. Shortly after construction on the project began and four months before the Trujillos' accident, Ball's project manager, Shankar Narayanan, wrote to Larry Durrant, UDOT's project engineer, expressing his concern that UDOT's traffic control plan was inadequate. The letter stated in part:

> This letter is to reiterate our concerns with regard to UDOT's less than adequate traffic control design for this project. In particular we feel that the use of drums at 100' spacing to delineate opposing traffic in an Interstate highway is hazardous to the travelling public resulting in increasing the chances of accidents.

¶ 7 Five days later, Durrant answered the letter, stating that "[i]f [Ball] feels UDOT's traffic control plans are inadequate, then as outlined [in the contract], the traffic control supervisor's responsibility is to prepare and submit revisions to the traffic control plans for the subject project." Narayanan testified in his deposition that he and Durrant discussed possible options for addressing his concerns, including the use of concrete barriers. However, it is undisputed that no aspect of the traffic control plan was altered.

¶ 8 About one year after the September 1995 accident, the Trujillos filed suit against UDOT and Ball in Third District Court. The Trujillos alleged that UDOT and Ball were negligent in the design, supervision, and implementation of the traffic control plan for the I–84 resurfacing project. Specifically, the Trujillos alleged that UDOT and Ball negligently failed to install concrete barriers to prevent crossover accidents in the area where the Trujillos' accident took place.

¶ 9 UDOT and Ball moved for summary judgment, arguing they owed no duty of care to protect the Trujillos from crossover accidents. UDOT also argued that governmental immunity shielded it from tort liability. The trial court granted summary judgment in favor of both defendants, reasoning that "the decision made by UDOT in planning and designing the I–84 resurfacing project, which included a Traffic Control Plan utilizing barrels to separate [traffic in the TLTWO] was a discretionary act which created immunity for UDOT under the discretionary function exception to the Governmental Immunity Act." The court further ruled that "in carrying out the plans and specifications for I–84 drafted by UDOT, [Ball] acted in accordance with the plans and specifications, which were not so unreasonably dangerous that a reasonable contractor would not perform and carry out said plans and specifications."

¶ 10 The Trujillos timely appealed to the Utah Supreme Court, which transferred the matter to this court as permitted by Utah Code Ann. § 78–2a–3(2)(j) (1996).

ISSUES AND STANDARDS OF REVIEW

¶ 11 The Trujillos raise two issues on appeal. First, the Trujillos argue the trial court erred when it concluded that governmental immunity shields UDOT from liability for alleged negligence in planning and designing the I–84 resurfacing project, including formulating the traffic control plan, and in ruling that design of the project was a discretionary function under a provision of the Utah Governmental Immunity Act, Utah Code Ann. § 63–30–10(1) (1997).[1] Second,

1. As a convenience to the reader, and because the provisions in effect at the relevant times do not differ materially from the statutory provisions currently in effect, we cite to the most recent statutory codifications throughout this opinion, unless otherwise noted.

the Trujillos challenge the trial court's conclusions that, as a matter of law, the traffic control plan designed by UDOT was not unreasonably dangerous and that Ball was therefore not negligent in implementing it.

[2] ¶ 12 "Summary judgment is proper only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Taylor v. Ogden Sch. Dist.*, 927 P.2d 159, 162 (Utah 1996). We review the trial court's conclusion that the parties raised no genuine issues of material fact, and its application of the governing law, for correctness. *See Nelson v. Salt Lake City*, 919 P.2d 568, 571 (Utah 1996). As we analyze the issues, we are mindful that, "because negligence cases often require the drawing of inferences from the facts, which is properly done by juries rather than judges, 'summary judgment is appropriate in negligence cases only in the clearest instances.'" *Id.* (quoting *Dwiggins v. Morgan Jewelers*, 811 P.2d 182, 183 (Utah 1991)).

DISCRETIONARY FUNCTION IMMUNITY

[3] ¶ 13 Sovereign immunity, rooted in the medieval British notion that the King could do no wrong, precludes lawsuits against governmental entities without the government's consent. *See Brittain v. State*, 882 P.2d 666, 668–69 (Utah Ct.App.1994).

A. Statutory Immunity Scheme

¶ 14 In 1965, the Utah Legislature passed the Governmental Immunity Act, codifying the sovereign immunity doctrine in Utah. *See DeBry v. Noble*, 889 P.2d 428, 432 (Utah 1995) (citing 1965 Utah Laws 390, ch. 139, § 3). The Act first grants general immunity from suit to governmental entities, then narrows that general grant by waiving immunity for certain claims, and finally broadens immunity again with exceptions to the waivers that result in retaining immunity under certain circumstances. *See Hansen v. Salt Lake County*, 794 P.2d 838, 842 (Utah 1990).

¶ 15 Section 63–30–3(1) of the Act confers the general grant of immunity: "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[.]" Utah Code Ann. § 63–30–3(1) (1997). "Governmental function" is broadly defined as "any act, failure to act, operation, function, or undertaking of a governmental entity." *Id.* § 63–30–2(4)(a) (1997). *Cf. Keegan v. State*, 896 P.2d 618, 620 (Utah 1995) ("[T]he test for determining whether the activity undertaken is a governmental function focuses on whether that activity '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.'") (quoting *Standiford v. Salt Lake City Corp.*, 605 P.2d 1230, 1236–37 (Utah 1980)).

¶ 16 Scattered sections of the Act waive immunity under particular circumstances. Thus, the Act permits claims against governmental entities that involve contract obligations, *see* Utah Code Ann. § 63–30–5 (1997); property, *see id.* §§ 63–30–6, –10.5; defective public buildings and improvements, *see id.* § 63–30–9; and negligent acts and omissions of public employees. *See id.* § 63–30–10. The Act specifically waives immunity for injuries caused by dangerous or defective highways. *See id.* § 63–30–8. When immunity is waived, the "liability of the [governmental] entity [is] determined as if the entity were a private person." *Id.* § 63–30–4(1)(b).

¶ 17 For certain kinds of claims, however, such waivers of immunity are restricted by a number of exceptions. *See* Utah Code Ann. § 63–30–10 (1997). Thus, although the Act waives immunity for liability from injuries caused by defective conditions of public buildings and highways, and by the negligence of public employees, immunity is retained "if the injury ar[ose] out of, in connection with, or result[ed] from" one of nineteen enumerated circumstances. *Id.* For example, immunity is retained if an injury resulted from a failure to revoke a permit, *see id.* § 63–30–10(3), or make an inspection. *See id.* § 63–30–10(4). Immunity is also retained with respect to injuries caused by natural conditions on public land. *See id.* § 63–30–10(11). Of particular significance in this appeal, immunity is retained for injuries that arise out of "the exercise or performance or the failure to exercise or perform a discre-

tionary function, whether or not the discretion is abused." *Id.* § 63–30–10(1).

[4] ¶ 18 To determine whether the trial court correctly ruled that the Governmental Immunity Act bars the Trujillos from proceeding with their negligence claims against UDOT, we follow the three-step analysis established by the Utah Supreme Court. *See Keegan*, 896 P.2d at 619–20; *Ledfors v. Emery County Sch. Dist.*, 849 P.2d 1162, 1164 (Utah 1993). Tracking the logic of the Act, the established analysis addresses three issues. Applied to the facts of this case, they are, first, whether the design of the traffic control plan for the I–84 resurfacing project was a governmental function to which section 63–30–3(1)'s general grant of immunity applies, *see Keegan*, 896 P.2d at 619–20; second, if the design of the traffic control plan is a governmental function, whether the Act waives immunity for injuries arising out of the particular governmental function at issue, *see id.*; and finally, even if immunity is otherwise waived, whether an exception applies that retains immunity for the exercise of that governmental function. *See id.*

¶ 19 The parties agree that UDOT's construction of I–84 is a governmental function and, thus, that the Governmental Immunity Act applies to the Trujillos' claims against UDOT. Likewise, the parties agree that "immunity from suit of all governmental entities is waived for any injury caused by a defective, unsafe, or dangerous condition of any highway." Utah Code Ann. § 63–30–8 (1997). Here, however, agreement between the parties ends. Their disagreement centers on the final prong of the three-part test: whether, even though section 63–30–8's waiver appears to permit the Trujillos to pursue their claims against UDOT for injuries they allege were caused by a defective, unsafe, or dangerous condition of I–84, an exception specified in the Act nevertheless bars the Trujillos' action. UDOT argues the trial court correctly concluded that the "discretionary function" exception does just that.

[5] ¶ 20 Section 63–30–10 provides, in relevant part, as follows:

> 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 arises out of, in connection with, or results from
>
> (1) the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused. . . .

Id. § 63–30–10. Utah precedent interpreting and applying the discretionary function exception has articulated two policies served by the exception. First, the discretionary function exception "'"shield[s] those governmental acts and decisions impacting on large numbers of people in a myriad of unforeseen ways from individual and class legal actions, the continual threat of which would make public administration all but impossible."'" *Keegan*, 896 P.2d at 623 (citations omitted). Second, the exception preserves the autonomy of coordinate branches of government. To that end, "'[w]here the responsibility for basic policy decisions has been committed to one of the branches of our tri-partite system of government, the courts have refrained from sitting in judgment of the propriety of those decisions.'" *Id.* (quoting *Little v. Utah State Div. of Family Servs.*, 667 P.2d 49, 51 (Utah 1983)).

B. Policy-making Versus Operations

[6] ¶ 21 Discretionary function immunity has been interpreted and applied in a manner consistent with the policies it was intended to promote. Thus, the Utah Supreme Court has recently stated that, in comparison to the ancient doctrine of sovereign immunity, discretionary function immunity is "a distinct, more limited form of immunity [that] should be applied only when a plaintiff is challenging a governmental decision that involves a basic policy-making function." *Nelson v. Salt Lake City*, 919 P.2d 568, 575 (Utah 1996). Not every governmental action involving discretion is a discretionary function within the meaning of the Act. *See Bigelow v. Ingersoll*, 618 P.2d 50, 53 (Utah 1980). Were it otherwise, the exception would swallow the rule, as almost all governmental decisions involve some discretion. *See Nelson*, 919 P.2d at 575; *Bigelow*, 618 P.2d at 53. Consequently, only those decisions arising out of a governmental entity's basic policy-

making function qualify for immunity under the discretionary function exception. *See Keegan*, 896 P.2d at 623.

[7] ¶ 22 "Although the term 'discretionary function' is not susceptible to precise definition in all legal contexts," *Nelson*, 919 P.2d at 575, case law interpreting discretionary function immunity has stated that " '[d]iscretionary acts are those "characterized by a high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning." ' " *Keegan*, 896 P.2d at 625 (citations omitted). Governmental decisions that are " ' "the result of serious and extensive policy evaluation, judgment, and expertise in numerous areas of concern" ' " qualify as immune discretionary functions. *Id.* (citations omitted).

[8, 9] ¶ 23 In contrast to governmental decisions involving evaluation of broad policy factors, "acts and decisions at the operational level—those everyday, routine matters"—are not discretionary functions. *Nelson*, 919 P.2d at 575. Therefore, while the formulation of policy is an immune discretionary function, "the execution of already-formulated policies" is not. *Keegan*, 896 P.2d at 623. Allegations that a governmental entity has been negligent must be separately examined to determine if each act complained of is an immunized discretionary function or is merely an operational or ministerial implementation of already-established policy. *See Hansen*, 794 P.2d at 846; *Doe v. Arguelles*, 716 P.2d 279, 283 (Utah 1985). *See also Rocky Mountain Thrift Stores, Inc. v. Salt Lake City Corp.*, 784 P.2d 459, 463–64 (Utah 1989) (analyzing separately each allegation of negligence under exception retaining immunity for negligent failure to inspect or inadequate inspection).

¶ 24 Guided by these distinctions, prior case law has held, for example, that "[d]ecisions made by [Salt Lake City] regarding the design, capacity, and construction of their flood control systems" were immunized under the discretionary function exception because the decisions were "the result of serious and extensive policy evaluation, judgment, and expertise in numerous areas of concern[, including] geological, environmental, financial, and urban planning and developmental concerns, and financial concerns." *Rocky Mountain Thrift*, 784 P.2d at 463. Likewise, the Utah Supreme Court has held that the process by which UDOT determines when railroad crossing warnings will be upgraded is a discretionary function. *See Duncan v. Union Pac. R.R.*, 842 P.2d 832, 835 (Utah 1992). Finally, our Supreme Court recently held that it was an act of discretion for UDOT to decide not to replace a concrete barrier when, after two road surface overlays, it no longer reached the height required by safety standards. *See Keegan*, 896 P.2d at 619, 626. The Court held that "the determination of whether to raise the concrete median barrier was a decision inherently bound up in economic, political, and safety considerations, as indicated by [the UDOT safety engineer's] safety study report and [the UDOT project design engineer's] cost-benefits report." *Id.* at 625.

¶ 25 In contrast, the Court has ruled that the State was not immune from suit for injuries caused by an allegedly dangerous traffic control system because, "[a]lthough the acts of the State ... in designing the traffic control system involve some degree of discretion, as do almost all acts, the design of the traffic control system does not involve the 'basic policy making level.' " *Bigelow*, 618 P.2d at 53. Similarly, in *Andrus v. State*, 541 P.2d 1117 (Utah 1975), our Supreme Court held that "[t]he decision to build [a] highway and specifying its general location were discretionary functions, but the preparing of plans and specifications and the supervision of the manner in which the work was carried out cannot be labeled discretionary functions." *Id.* at 1120. Thus, the Court held that the State enjoyed no immunity from suit for water damage to property allegedly arising out of the design and specifications for construction of a highway. *See id.*

¶ 26 Likewise, the Utah Supreme Court held in *Carroll v. State ex rel. Road Comm'n*, 27 Utah 2d 384, 496 P.2d 888 (1972), that "the decision of the road supervisor to use berms as the sole means of protection for the unwary traveler [proceeding onto a closed road] was not a basic policy decision essential

to the realization or accomplishment of some basic governmental policy, program, or objective," but was merely a determination made at the operational level. 496 P.2d at 891–92. *See also Nelson*, 919 P.2d at 575–76 (holding that failure of governmental entity to repair breach in fence through which child gained access to river was not immune discretionary function); *Arguelles*, 716 P.2d at 283 (holding that decision to return juvenile offender to community was immunized discretionary function, but alleged negligence in monitoring juvenile's treatment after release was not similarly immune); *Little v. Utah State Div. of Family Servs.*, 667 P.2d 49, 51–52 (Utah 1983) (holding that, even if decision to place high-need child in foster home was immune discretionary function, alleged failure of Family Services to evaluate foster home, supervise placement, and protect child from harm was actionable).

[10–13] ¶ 27 Immunity is an affirmative defense which the defendant bears the burden of proving. *See Nelson*, 919 P.2d at 574. If UDOT "posits immunity on ... an exercise of discretion, it must make a showing that a conscious balancing of risks and advantages took place." [2] *Little*, 667 P.2d at 51. Accordingly, to successfully bear its burden of proving immunity from suit for the Trujillos' injuries, UDOT must show that each act of alleged negligence qualifies as a discretionary function under the following four-part test:

> "(1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned 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 authori-

2. We note that the United States Supreme Court, in interpreting a similar discretionary function exception in the Federal Tort Claims Act, has not required such a showing. *See United States v. Gaubert*, 499 U.S. 315, 325, 111 S.Ct. 1267, 1275, 113 L.Ed.2d 335 (1991) (holding that, under FTCA, "[d]iscretionary conduct is not confined to the policy or planning level," and "acts of agency employees in executing [a] program" are also discretionary). Of course, this analytic approach is not binding on our interpretation of the discretionary function exception in the Utah Governmental Immunity Act, and the analysis consistently employed by the Utah Supreme Court is to the contrary.

In *Carroll v. State ex rel. Road Commission*, 27 Utah 2d 384, 496 P.2d 888 (1972), one of the earliest Utah cases interpreting the discretionary function exception, our Supreme Court recognized that the discretionary function exception in Utah's Governmental Immunity Act was patterned after a similar provision in the Federal Tort Claims Act. *See* 27 Utah 2d at 388, 496 P.2d at 891. Later, in *Little v. Utah State Division of Family Services*, 667 P.2d 49 (Utah 1983), the Court cited federal case law in support of the policy-versus-operations distinction first announced in *Carroll*. *See Little*, 667 P.2d at 51 ("[T]he lines in federal cases have been consistently drawn between those functions ascribable to the policy making level and those to the operational level[.]") (citing *Dalehite v. United States*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953); *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955)). More recently, the United States Supreme Court, in *United States v. Gaubert*, referred to the policy-versus-operations distinction as a misinterpretation of its earlier cases. *See* 499 U.S. at 326, 111 S.Ct. at 1275 ("[T]he distinction in *Dalehite* was merely description of the level at which the challenged conduct occurred. There was no suggestion that decisions made at an operational level could not also be based on policy.").

We recognize that the *Keegan* court cited a Fourth Circuit case that followed *Gaubert*'s abrogation of the policy/operational distinction. *See Baum v. United States*, 986 F.2d 716 (4th Cir.1993). The *Keegan* court quoted *Baum* for the proposition that, "to determine whether a certain decision involved the exercise of a discretionary function, courts must 'look to the nature of the challenged decision in an objective, or general sense, and ask whether the decision is one which we would expect inherently to be grounded in considerations of policy.' " *Keegan*, 896 P.2d at 625 (quoting *Baum*, 986 F.2d at 721). However, because *Keegan* applied the *Little* test and relied on evidence that the decisions there at issue were in fact made on the policy level after careful study and deliberation, we do not consider *Keegan* to have appreciably detracted from the validity of the long-standing policy-versus-operational analysis, which requires evidence that "a conscious balancing of risks and advantages took place" regarding each allegedly negligent act. *Little*, 667 P.2d at 51.

ty and duty to do or make the challenged act, omission, or decision?"

Keegan, 896 P.2d at 624 (quoting *Little*, 667 P.2d at 51).

[14] ¶ 28 This is a fact-intensive inquiry that, by its very nature, is not particularly amenable to summary judgment. *See, e.g., Hansen*, 794 P.2d at 846 (reversing summary judgment of immunity and remanding for further factual development regarding whether decision was one of policy or operation); *Rocky Mountain Thrift Stores*, 784 P.2d at 464 (same). *But see Duncan*, 842 P.2d at 836 (affirming summary judgment for State on immunity grounds).

C. Analysis of Trujillos' Claims

¶ 29 The Trujillos charge UDOT with five separate acts of negligence. The Trujillos allege UDOT negligently (1) designed and implemented an unsafe traffic control plan for the I–84 resurfacing project; (2) used hollow plastic barrels rather than concrete barriers to separate traffic in the construction zone; (3) failed to reduce the speed limit in the construction zone as directed by the traffic control plan; (4) failed to investigate other accidents that had occurred in the construction zone prior to the Trujillos' accident and to make appropriate adjustments in traffic control to reduce the risk of future accidents; and (5) failed to alter traffic control techniques in response to the concerns of Ball's project manager, Mr. Narayanan. While we believe UDOT's basic decision to undertake the I–84 resurfacing project necessarily would be considered an immune discretionary function, we hold, on the record before us, that the discretionary function exception does not immunize UDOT from the claims the Trujillos have raised.

[15] ¶ 30 We first consider the Trujillos' claim that UDOT negligently designed an inadequate traffic control plan for the I–84 resurfacing project. We hold that the record on appeal does not support the trial court's conclusion that the design of the traffic control plan and its preference for barrels over barriers was made at the immunized policy-making level. The evidence presented by UDOT falls short of the standards set forth in prior Utah Supreme Court precedent. *Keegan* provides an illustrative contrast. In that case, our Supreme Court detailed the process by which UDOT decided not to replace a concrete barrier even though it knew planned surface overlays would reduce its height below required safety standards. The Supreme Court noted that, before the second surface overlay, a UDOT safety studies engineer "carried out a comprehensive study of accident rates" from which he created a safety study report. *Keegan*, 896 P.2d at 624. The report concluded that safety would not be adversely affected if the barrier were not replaced during the second overlay. *See id.* Also before the second resurfacing, a UDOT project design engineer prepared a cost-benefit report using information from the safety study report. *See id.* The cost-benefit report considered factors such as

> the cost of removing and replacing the barrier, the already-scheduled major resurfacing project for I–80 in five or six years, the added delays and inconvenience to users of the highway if the barrier were to be dug up and replaced, and the possibility that the job could not be completed inexpensively and with minimal disruption to traffic during the short construction season in the canyon.

Id. This study and report were conducted and compiled "by senior engineers and circulated throughout and debated within the department." *Id.* After parsing the particulars of the decision-making process, the Court concluded that "UDOT's decision involved just the sort of policy-driven weighing of costs and benefits that the discretionary function exception was meant to protect." *Id.*

¶ 31 In this appeal, on the other hand, it is undisputed that the traffic control plan was formulated by an unlicensed UDOT staff engineer—an employee who did not perform at the policy-making level. Further, while the record on appeal contains a general description of the multi-level approval process for plans and specifications pertaining to the I–84 resurfacing project, UDOT's evidence does no more than establish the traffic control plan *could* have been discussed in these meetings. UDOT does not point us to evidence that the traffic control plan and the

barrels-versus-barriers decision was in fact the subject of intense scrutiny and review. UDOT now characterizes the decision to use barrels as a "tough choice" between two traffic separation methods and draws our attention to the relative risks and benefits of barrels and barriers. However, UDOT's evidence shows these issues were addressed only in private discussions between the project design engineer who drafted the traffic control plan and UDOT's Region One Design Engineer. These facts are insufficient to bring the formulation of the traffic control plan within the scope of discretionary function immunity.

¶ 32 Similarly, the Trujillos presented evidence to the trial court that the Manual of Uniform Traffic Control Devices (MUTCD), adopted by UDOT, listed particular "industry standard" factors to be considered before implementing TLTWO, specifically to guard against head-on collisions. The Trujillos presented additional evidence that an Occupational Safety Report for the stretch of I–84 involved in the resurfacing project was available, and, if consulted by UDOT, would have shown that accidents in the construction zone clustered around the area where the Trujillos' accident took place. Nevertheless, while the Occupational Safety Report and evidence of traffic-volume reports appear in the record, UDOT presented no documentary or testimonial evidence that either the MUTCD factors, the Occupational Safety Report, or the traffic volume reports were discussed in the course of approving the traffic control plan.[3]

¶ 33 UDOT argues the Governmental Immunity Act does not require it to consult written studies or to prove that specific issues were addressed during the decision-making process. UDOT contends the holding of *Keegan* is that decisions regarding highway median design and lane separation are inherently discretionary functions. We disagree. Utah cases interpreting the discretionary function exception, including *Keegan*, have focused on the *process* by which decisions of governmental entities are made. Under Utah precedent, we cannot assume UDOT's traffic control plan was the product of the exercise of policy-level discretion simply because it dealt with highway median design. UDOT proffered no evidence that the formulation of the traffic control plan and the decision to separate opposing lanes of traffic with hollow plastic barrels were "'"the result of serious and extensive policy evaluation, judgment, and expertise in numerous areas of concern."'" *Keegan*, 896 P.2d at 625 (citations omitted). On the record before us, therefore, we hold that UDOT's formulation of the traffic control plan and its decision to use barrels rather than barriers have not been shown to rise to the immunized policy-making level.

[16] ¶ 34 We next consider the negligent acts UDOT allegedly committed after the traffic control plan was in effect in the construction zone. We hold that these remaining allegations of negligence involve operational decisions on the part of UDOT, which implemented or failed to implement pre-established policy. *See Nelson*, 919 P.2d at 575–76; *Keegan*, 896 P.2d at 623. Specifically, we hold that failure to reduce speed in the construction zone as called for in the plan, failure to investigate accidents, and failure to meaningfully consider corrective action in response to Mr. Narayanan's letter[4] all are "acts and decisions at the operational level—those every day, routine matters" that do not enjoy immunity under the discretionary function exception. *Nelson*, 919 P.2d at 575.

3. Whether due to the Occupational Safety Report or on some other basis, UDOT did see fit to require concrete barriers rather than plastic barrels to protect the construction crews working on the shoulder of the highway from traffic.

4. Mr. Durrant's letter responding to Mr. Narayanan's concern is perhaps more interesting for what it does not say than for what it does say. If indeed the traffic control plan had been the result of the kind of policy analysis the discretionary function exception contemplates, we might expect Mr. Durrant to have responded that, as a matter of policy, UDOT had determined that the traffic control plan, as written, adequately balanced competing concerns, such as safety and cost, and, because it was the product of extensive policy evaluation, it could not casually be altered. This, however, was not the tenor of his reply. Instead, he merely invited Mr. Narayanan to propose an alternative plan if he were so concerned.

¶ 35 The acts and omissions of which the rujillos complain are analogous to those addressed in *Doe v. Arguelles*, 716 P.2d 279, 83 (Utah 1985), in which the Utah Supreme ourt ruled that the State did not enjoy nmunity when a juvenile with a history of exual violence assaulted a young girl while e was in a community placement while in tate custody. *See id.* The Court recogized that the decision to place the juvenile ffender in the community was an immune iscretionary decision made by the superinendent of the Youth Detention Center. *See d.* The Court ruled, however, that the failre of the superintendent to ensure that the ffender received proper therapy, which had een prescribed by the superintendent himelf, was actionable because it concerned the nanner in which the superintendent implemented policy and not the policy itself. *See id.*

¶ 36 The Trujillos presented unrebutted evidence that the speed limit in the construction zone remained at 65 miles per hour despite the fact that the traffic control plan called for the speed limit to be reduced to 50 m.p.h. The Trujillos presented additional evidence that although two crossover accidents had occurred in the construction zone before the Trujillos' accident, UDOT had not investigated or analyzed either of them even though the traffic control plan mandated that accidents in the construction zone be investigated and analyzed.

¶ 37 These alleged omissions occurred *after* the allegedly unsafe and inadequate traffic control plan was adopted. Therefore, to echo the Court's conclusion in *Doe v. Arguelles*, even if the formulation of the plan was an immune discretionary function, immunity would not extend so far as to protect UDOT from liability for negligently executing the plan.

D. Conclusion

¶ 38 On the record before us, UDOT has not demonstrated that discretionary function immunity shields it from liability. The Trujillos' evidence, both as to the formulation and execution of the traffic control plan, refutes UDOT's contention that the relevant decisions were made at the policy level rather than at the operational level.

LIABILITY OF BALL

[17–19] ¶ 39 We now consider Ball's potential liability to the Trujillos. A contractor has a duty to "perform the work required by its contract ... with that degree of care ordinarily possessed and exercised by other contractors doing the same or similar work in [the same] locality." *Andrus v. State*, 541 P.2d 1117, 1121 (Utah 1975). However, a "contractor is not liable if [it] has merely carried out the plans, specifications and directions given [it], since in that case the responsibility is assumed by the employer, *at least when the plans are not so obviously dangerous that no reasonable [person] would follow them.*" *Leininger v. Stearns–Roger Mfg. Co.*, 17 Utah 2d 37, 41, 404 P.2d 33, 36 (1965) (emphasis added). It follows that Ball can be held liable for the Trujillos' damages if, as the Trujillos allege, it negligently performed its responsibilities under its contract with UDOT or if the traffic control plan was so dangerous that a reasonable person would have refused to follow it.

[20] ¶ 40 First, regarding their allegation that UDOT's traffic control plan was so unreasonably dangerous that Ball should have refused to implement it, the Trujillos presented expert testimony that the plan failed to comply with MUTCD.[5] Moreover, the Trujillos allege that the letter from Ball's project manager, Mr. Narayanan, to UDOT's Larry Durrant shows that Ball was aware that separating opposing traffic with hollow plastic barrels posed an unreasonable danger to travelers on I–84. In the letter, Mr. Narayanan first voiced a concern over the meth-

5. Ball makes much of the fact that no evidence directly states that the traffic control plan was unreasonably dangerous. We note, however, that no witness could properly give that opinion because it is an ultimate question to be determined by the jury. The absence of evidence specifically describing the plan as unreasonably dangerous is, therefore, inconsequential. *See Gaw v. State ex rel. Dep't of Transp.*, 798 P.2d 1130, 1137 & n. 10 (Utah Ct.App.1990) (in summary judgment context, expert witness affidavits must not contain merely conclusory statements), *cert. denied*, unpublished order of Utah Supreme Court (Jan. 11, 1991).

od of separation and then tried to disclaim liability, stating that Ball "will implement the traffic control as shown on the plans and specification[s], however we will not be in a position to accept liability on accidents due to the conditions mentioned above." Five days later, Mr. Durrant responded, informing Mr. Narayanan that "[i]f Ball ... feels UDOT's traffic control plans are inadequate, then as outlined [in the contract], the traffic control supervisor's responsibility is to prepare and submit revisions to the traffic control plans for the subject project." Although Mr. Narayanan testified that he and Mr. Durrant discussed and resolved his concerns, Mr. Durrant did not recall any such conversation, and the plan was never revised. Thus, we conclude the evidence presented by the Trujillos is sufficient to create a material question of fact about whether the traffic control plan was unreasonably dangerous and whether Ball negligently failed to propose safer alternatives, as required by its contract with UDOT.

¶ 41 The Trujillos further allege Ball was negligent in failing to reduce the speed limit in the construction zone, keep an accident log, and investigate accidents that occurred in the construction zone, as required by the traffic control plan. Ball was responsible for traffic control in the construction zone, a responsibility it carried out in part through supervision and implementation of the traffic control plan. Nonetheless, although the traffic control plan called for a 50 m.p.h. speed limit through the construction zone, the speed limit remained at 65 m.p.h. Similarly, although the plan required Ball to include accident information in its project log, Ball failed to investigate the two accidents that occurred in the construction zone prior to the Trujillos' accident. These alleged acts of negligence, if proven, constitute negligent performance of Ball's duties under its contract with UDOT. Ball obviously cannot avail itself of the defense that it is not liable because it merely followed the plans and specifications provided by UDOT if in fact it failed to comply with the specifications of the traffic control plan. Ball, therefore, can be held liable for its negligent noncompliance with the plan whether or not the traffic control plan itself is found to be unreasonably dangerous.

[21–23] ¶ 42 These are questions of fact a jury must decide. Trial courts must avoid weighing evidence and assessing credibility when ruling on motions for summary judgment. *See Dubois v. Grand Central*, 872 P.2d 1073, 1076 (Utah Ct.App.1994). Moreover, "it is peculiarly fitting that [a jury should] determine" whether the conduct of Ball comported with " 'ordinary, reasonable care under the circumstances.' " *Canfield v. Albertsons, Inc.*, 841 P.2d 1224, 1227 (Utah Ct.App.1992) (quoting *DeWeese v. J.C. Penney Co.*, 5 Utah 2d 116, 121, 297 P.2d 898, 901 (1956)), *cert. denied*, 853 P.2d 897 (Utah 1993). Juries are uniquely qualified to judge whether conduct " 'falls above or below the standard of reasonable conduct deemed to have been set by the community.' " *Darrington v. Wade*, 812 P.2d 452, 459 n. 4 (Utah Ct.App.1991) (citations omitted). Issues of reasonableness and negligence, therefore, should not be decided on summary judgment except when " 'the applicable standard of care is "fixed by law," and reasonable minds could reach but one conclusion as to the defendant's negligence under the circumstances.' " *Id.* at 459 (citations omitted). Likewise, the issue of proximate cause is a question of fact for the jury to determine in all but the clearest cases. *See Nelson ex rel. Stuckman v. Salt Lake City*, 919 P.2d 568, 574 (Utah 1996).

CONCLUSION

¶ 43 UDOT failed to prove, as a matter of law, that it was immune from liability to the Trujillos under the discretionary function doctrine, and questions of material fact permeate the issue of Ball's potential liability to the Trujillos. Accordingly, we reverse the summary judgment in favor of UDOT and Ball and remand to the trial court for trial or such other proceedings as may now be appropriate.

¶ 44 I CONCUR: NORMAN H. JACKSON, Judge.