

1992

# Margot de Villiers v. Utah County, Highland City, and John Does 1-3 : Reply Brief

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca1](https://digitalcommons.law.byu.edu/byu_ca1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Gary B. Ferguson; Williams & Hunt; attorney for appellee.

Stephen G. Morgan, Joseph E. Minnock; Morgan & Hansen; attorneys for appellant.

---

## Recommended Citation

Reply Brief, *Villiers v. Utah County*, No. 920765 (Utah Court of Appeals, 1992).  
[https://digitalcommons.law.byu.edu/byu\\_ca1/3759](https://digitalcommons.law.byu.edu/byu_ca1/3759)

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

UTAH  
DOCUMENT  
KFU  
CO

LC

920765

---

IN THE UTAH COURT OF APPEALS

---

MARGOT de VILLIERS,	:	
Plaintiff/Appellant,	:	Appeal No. 920765-CA
vs.	:	Priority No. <del>16</del> 15
UTAH COUNTY, HIGHLAND CITY,	:	
and JOHN DOES 1-3,	:	
Defendants/Appellee.	:	

---

REPLY BRIEF

---

APPEAL

From the Judgment of the Fourth Judicial  
District Court in and for Utah County  
Honorable George E. Ballif, District Judge, (Retired)

---

GARY B. FERGUSON  
WILLIAMS & HUNT  
257 East 200 South, Suite 500  
P.O. Box 45678  
Salt Lake City, UT 84145-5678  
  
Attorney for Appellee

STEPHEN G. MORGAN  
JOSEPH E. MINNOCK  
MORGAN & HANSEN  
Kearns Building, 8th Floor  
136 South Main Street  
Salt Lake City, UT 84101

Attorneys for Appellant

**FILED**  
Utah Court of Appeals

MAR 31 1993

*Handwritten signature*

---

IN THE UTAH COURT OF APPEALS

---

MARGOT de VILLIERS,	:	
Plaintiff/Appellant,	:	Appeal No. 920765-CA
vs.	:	Priority No. 16
UTAH COUNTY, HIGHLAND CITY,	:	
and JOHN DOES 1-3,	:	
Defendants/Appellee.	:	

---

REPLY BRIEF

---

APPEAL

From the Judgment of the Fourth Judicial  
District Court in and for Utah County  
Honorable George E. Ballif, District Judge, (Retired)

---

GARY B. FERGUSON  
WILLIAMS & HUNT  
257 East 200 South, Suite 500  
P.O. Box 45678  
Salt Lake City, UT 84145-5678  
Attorney for Appellee

STEPHEN G. MORGAN  
JOSEPH E. MINNOCK  
MORGAN & HANSEN  
Kearns Building, 8th Floor  
136 South Main Street  
Salt Lake City, UT 84101  
Attorneys for Appellant

**TABLE OF CONTENTS**

STATEMENT OF THE FACTS . . . . .	1
SUMMARY OF THE ARGUMENT . . . . .	1
DETAIL OF THE ARGUMENT . . . . .	4
OVERVIEW . . . . .	4
POINT I . . . . .	5
HIGHLAND CITY HAS WAIVED IMMUNITY FOR ITS NEGLIGENT DESIGN OF THE INTERSECTION . . .	5
POINT II-IV . . . . .	14
PLAINTIFF CONCEDES THAT HIGHLAND CITY CANNOT BE HELD LIABLE FOR FAILING TO MAINTAIN OR SIGN 11500 NORTH. . . . .	14
POINT V . . . . .	14
UTAH CODE ANN. § 63-30-10(1)(d) (1992) RELATING TO NEGLIGENT INSPECTION BY A GOVERNMENTAL ENTITY, DOES NOT APPLY IN THIS CASE BECAUSE THE CAUSE OF ACTION DID NOT ARISE OUT OF THE NEGLIGENT INSPECTION . .	15
CONCLUSION . . . . .	15

## **TABLE OF AUTHORITIES**

### **Cases**

<u>Andrus v. State</u> , 541 P.2d 1117 (Utah 1975) . . . . .	2, 4, 9
<u>Bennett v. Bow Valley Development</u> , 797 P.2d 419 (Utah 1990) . . . . .	2, 9
<u>Bigelow v. Ingersoll</u> , 618 P.2d 50 (Utah 1980) . . . . .	2, 4, 9
<u>Carroll v. State Road Comm.</u> , 496 P.2d 888 (Utah 1972) . . . . .	2, 4, 9
<u>Godesky v. Provo City</u> , 690 P.2d 541 (Utah 1984) . . . . .	3, 13
<u>Harris v. Utah Transit Authority</u> , 671 P.2d 217 (Utah 1983) . . . . .	13
<u>Ingram v. Salt Lake City</u> , 733 P.2d 126 (Utah 1987) . . . . .	5, 15
<u>Jones v. Bountiful City</u> , 834 P.2d 556 (Utah App. 1992) . . . . .	7, 14
<u>Loveland v. Orem City</u> , 746 P.2d 763 (Utah 1987) . . . . .	2, 6, 7

### **Statutes and Rules**

Utah Code Ann. § 63-30-8 (1989) . . . . .	2, 5, 6, 9
Utah Code Ann. § 63-30-10(1)(c) (1989) . . . . .	5
Utah Code Ann. § 63-30-10(1)(d) (1989) . . . . .	14

---

IN THE UTAH COURT OF APPEALS

---

MARGOT de VILLIERS,	:	
	:	Appeal No. 920765-CA
Plaintiff/Appellant,	:	
	:	Priority No. 16
vs.	:	
UTAH COUNTY, HIGHLAND CITY,	:	
and JOHN DOES 1-3,	:	
	:	
Defendants/Appellee.	:	

---

REPLY BRIEF

---

APPEAL

From the Judgment of the Fourth Judicial  
District Court in and for Utah County  
Honorable George E. Ballif, District Judge, (Retired)

---

**STATEMENT OF THE FACTS**

The Plaintiff has no objection to any statement of fact presented by Highland City in its Statement of Relevant Facts.

**SUMMARY OF THE ARGUMENT**

Highland City's argument that it is immune from suit because the Plaintiff's action purportedly arises out of the approval of the plat map is without merit. The Plaintiff's injuries arose out of Highland City's negligent design of the Intersection. While Highland City was also negligent in failing to catch its own

negligence before approving the plat and in failing to inspect the Intersection, the efficient force which caused Plaintiff's injuries was Highland City's defective design of the Intersection. To hold otherwise would allow Highland City to absolve itself of liability through issuance of a self-serving permit or approval.

Loveland v. Orem City, 746 P.2d 763 (Utah 1987), does not apply to the present case because in Loveland, the Court held that a municipality is immune from suit against allegations that it failed to catch the negligence of the developer. There is nothing in Loveland which can be construed as granting immunity from allegations that the municipality was the negligent party. Highland City is asking this Court to carve out an area where it should be allowed the freedom to act negligently without accountability. However, the Utah Legislature has already mandated that municipalities do not have immunity against allegations that they negligently designed, constructed or maintained streets and roads. Utah Code Ann. § 63-30-8 (1989); see also Bigelow v. Ingersoll, 618 P.2d 50 (Utah 1980); Andrus v. State, 541 P.2d 1117 (Utah 1975); Carroll v. State Road Comm., 496 P.2d 888 (Utah 1972).

Bennett v. Bow Valley Development, 797 P.2d 419 (Utah 1990), also stands for the proposition that a municipality cannot be held liable for failing to catch the negligence of a developer. However, it is inappropriate for Highland City to extrapolate this

principle to shield itself from its own negligence.

Highland City's final argument is that it cannot be held liable because the developer should have informed Highland City of the poorly designed Intersection. This argument, made for the first time on appeal, is completely unsupported by any case law or statutory authority. It is nothing more than a conclusory statement made in a last ditch effort to avoid liability. However, assuming Highland City is correct in this statement of law, it creates genuine issues of material fact which must be decided by the trier of fact. The trier of fact must determine whether or not industry standards require the developer to inform the municipality of the entity's poor design. The trier of fact must also rule on whether the developer in this case did, in fact, inform Highland City of the defective design of the Intersection.

Even if the developer negligently failed to point out Highland City's negligent design of the Intersection, the law of intervening cause holds that this failure would not relieve Highland City of liability if the developer's failure was foreseeable. Godesky v. Provo City, 690 P.2d 541 (Utah 1984). The trier of fact must determine whether or not the developer's intervening negligence was foreseeable. If so, Highland City is still liable for its negligent design of the Intersection.

Highland City has waived immunity for the allegations in



Plaintiff's Complaint.

## DETAIL OF THE ARGUMENT

### OVERVIEW

In her original memorandum, Plaintiff challenged Highland City to respond to one simple question: Why would the Legislature allow municipalities the freedom to negligently design roads in private subdivisions which provide access to public roads when it would not allow municipalities to negligently design public roads without accountability? Bigelow v. Ingersoll, 618 P.2d 50 (Utah 1980); Andrus v. State, 541 P.2d 1117 (Utah 1975); Carroll v. State Road Comm., 496 P.2d 888 (Utah 1972).

Highland City never addressed this challenge. Highland City never argues that such a distinction should be made between private roads negligently designed by the municipality and public roads negligently designed by the municipality. Yet this is the key issue in this case, for to grant immunity to Highland City for its actions in this case is to carve out an area where municipalities are free to act negligently without accountability. Plaintiff respectfully contends that Highland City has presented no arguments which suggest that the Legislature intended to allow municipalities a "freebie", an area where it cannot be held accountable for its negligence. Instead, all of the case law and all of the statutory authority lead to the opposite conclusion. A Municipality should be

held liable whether the road it negligently designs is a public or a private road. Utah Code Ann. § 63-30-8 (1989).

Also absent from Highland City's brief is any denial that it indeed designed the Intersection. It appears that the parties are in agreement that Highland City negligently designed the Intersection, as testified to by the developer, Paul Frampton, and Richard Clayton. R. 486 (Deposition of Paul Frampton, pp. 12-13); R. 353 (Deposition of Richard Clayton, pp. 14-15). Thus, the central issue in this appeal is not whether Highland City was negligent in designing the Intersection. The parties agree on that fact. The issue is whether or not the Utah Legislature has granted Highland City the freedom to negligently design roads in private subdivisions which provide access to public roads.

#### POINT I

##### HIGHLAND CITY HAS WAIVED IMMUNITY FOR ITS NEGLIGENT DESIGN OF THE INTERSECTION

Highland City's first argument is that its actions are protected by Utah Code Ann. § 63-30-10(1)(c) (1989) because it merely approved the plat. But as demonstrated at length in Plaintiff's opening brief, this section is irrelevant because the cause of action did not "arise out of" Highland City's approval of the plat. Instead, this cause of action arose out of Highland City's negligent design of the Intersection. (Appellant's Brief, pp. 32-29). Highland City is still trying to "torture the facts" of

this case in order to pigeonhole this action into a category for which immunity is retained. Ingram v. Salt Lake City, 733 P.2d 126 (Utah 1987). The Utah Supreme Court has already held that such arguments are improper. Id.

Here, there can be no doubt that the cause of action arose out of Highland City's negligent design of the Intersection. Highland City is correct that it was also negligent in approving the plat containing the Intersection the city negligently designed. But the actual and proximate cause of the injury to the Plaintiff was Highland City's negligent design of the Intersection.

To hold otherwise would allow Highland City to absolve its own negligence by issuance of a self-serving approval. The law of governmental immunity could plummet to the point where every governmental entity issues a statement at the end of each road project indicating that indeed it was negligent in many aspects, and that the legislature had concededly waived immunity for those negligent acts, but nevertheless the governmental body can not be held liable because the entity has reviewed its own actions, decided that it does not want to be held liable, and has issued a permit or approval forever absolving its employees of liability and precluding actions by private citizens injured by that negligence. To any subsequent act for negligence in the design and construction of the road, the governmental entity would simply argue that it had

approved the negligent acts and, therefore, immunity is retained.

This despite the Utah Legislature's expressed intent to hold governmental entities liable for their actions with respect to roads and streets. Utah Code Ann. § 63-30-8 (1989). Highland City's end run around the statute should fail. The Utah Legislature's express intent to hold governmental entities liable for their negligent construction of roads should prevail.

Now we turn to Loveland v. Orem City, 746 P.2d 763 (Utah 1987). Highland City argues that in Loveland, the Utah Supreme Court held that municipalities cannot be held liable for negligence related to private developments. The Intersection was a private development. Therefore, Highland City cannot be held liable.

However, Highland City fails to capture the key distinction between Loveland and the present case. For clarity, Plaintiff will present the Lovelands' exact argument:

The Lovelands urge that this case comes within the waivers of immunity for several reasons. They claim that North Unions's canal comes within the definition of a culvert and argue that the minutes of the City Council meetings indicate that the City was aware of the canal that ran through the Executive Estates subdivision and the potential danger it presented to that subdivision's residents. Additionally, they claim that the Executive Estates subdivision is a "public improvement" which, without adequate implementation of a directive to fence the canal, created a dangerous condition which resulted in their son's death.

Loveland, 746 P.2d at 776. Thus, the essence of the Lovelands' argument was that Orem City failed to regulate or monitor the developer to make sure he protected residents of the subdivision from the culvert by fencing the canal. In other words, Orem City failed to catch the negligence of the developer. In the instant case, Highland City was the negligent party because it designed the Intersection, and thereby accepted the duty to do the job properly. Jones v. Bountiful City, 834 P.2d 556 (Utah App. 1992). The only negligence Highland City failed to catch was its own.

Thus, there is no support in Loveland for Highland City's position that it is immune from its own negligence. Loveland stands for the principle that a municipality is immune from allegations that it failed to catch the negligence of a developer. Highland City twists that principle into an unrecognizable position, arguing that because it does not have to catch the negligence of a subdivision developer, that gives it free reign to negligently design the subdivision itself and it is immune from suit for its own negligence.

Deeply submersed in Highland City's argument is its true contention with regard to Loveland. Highland City is arguing that it should have the freedom to imperil citizens through its negligence and should be allowed to absolve itself of liability. However, Highland City has not provided any public policy support

for that contention. Highland City also lacks statutes or case law supporting its position.

On the other hand, Plaintiff has provided several policy arguments as to why this should be avoided, not the least of which is, a municipality should not be immune from suit for imperilling residents living in private developments when the Utah Legislature has already stripped the same entity of immunity for imperilling those using public roads. These policy arguments have their foundation in both statute and case law, for the Utah Legislature and the Utah Supreme Court have consistently held that governmental entities should be held liable for the negligent design of streets and roads. Utah Code Ann. § 63-30-8 (1989); Bigelow v. Ingersoll, 618 P.2d 50 (Utah 1980); Andrus v. State, 541 P.2d 1117 (Utah 1975); Carroll v. State Road Comm., 496 P.2d 888 (Utah 1972).

Plaintiff respectfully submits that if Highland City is to be granted the freedom to act negligently, this should be based on sound public policy rather than a few sentences taken out of context from an easily distinguishable case. The fact that Highland City has not marshalled one policy argument lending credence to its position is good evidence that the Legislature never intended to grant municipalities immunity when they negligently design subdivisions.

Highland City also relies on Bennett v. Bow Valley

Development, 797 P.2d 419 (Utah 1990). In Bennett, the plaintiff alleged that Bow Valley was negligent in "filling natural drainage channels, failing to comply with grading plans, failing to construct roads in a safe manner and with proper compaction, and failing to revegetate cut slopes." Id. at 421. The allegations against Provo City were that it "released improvement bonds furnished by Bow Valley without requiring it to make the necessary improvements in the subdivision and that this constituted negligent release of the bonds." Id.

To compare Bennett to this case is to compare apples and oranges. The sole allegation against the municipality was that it failed to catch the negligence of the developer. There was no contention that Provo City filled the drainage channels or negligently constructed the road. The developer did these things. The City simply failed to make sure that each task was done right. The developer was the negligent party. In the instant case, Highland City, not the developer, was the negligent party. Once again, the mere fact that the Utah Supreme Court has held that municipalities are immune from allegations that they failed to catch the negligence of others cannot be translated into immunity for the municipality's own negligent design of a road.

Highland City asks this Court to focus on two words in the Bennett decision--"receipt and analysis". (Highland City's

Brief, p. 11). From these two words, Highland City argues that the Utah Supreme Court has expressly authorized it to negligently design subdivisions. From these two words, Highland City contends that the Legislature must have meant that municipalities could negligently design roads even though the Legislature already mandated in Utah Code Ann. § 63-30-8 (1992) that they could not negligently design public roads.

However, there is no support in the Bennett case for this proposition. There is no language in that opinion which could be remotely construed to mean that the Legislature intended to allow municipalities an area where they were free to act negligently. All the Court held was that if the developer was the designer and the negligent party, then the plaintiff can't bring suit against the municipality. There is no language which precludes suit against the municipality if that is the entity that was negligent in designing or constructing the road.

In a last ditch effort to avoid liability for its own negligence, Highland City argues, for the first time on appeal, that the developer was truly the negligent party. Highland City argues that the developer was negligent in that it should have informed Highland City of the City's negligence and requested that the Intersection be relocated to a safer location.

There are two problems with this argument. First, there



is absolutely no support for the proposition that a developer must inform the municipality of the municipality's negligence. Highland City not only fails to provide any legal support for its proposition, but it also fails to provide any expert opinion evidence suggesting that industry standards require the developer to "cure" the negligence of the municipality. Highland City could no doubt argue that such a contention has merit. However, Plaintiff could just as easily argue that the developer should be allowed to assume that when the municipality changes a plat, it has properly engineered the plat to insure that it is safe. Because this argument was raised for the first time on appeal, the parties are unprepared to present evidence to this Court on this proposition.

Instead, Highland City creates genuine issues of material fact warranting reversal of the summary judgment. The trier of fact, after hearing all relevant expert testimony and other evidence, is the proper entity to determine whether or not industry standards require the developer to inform the municipality of the City's negligent act. The trier of fact is the proper entity to determine whether or not the developer informed Highland City of its negligence in this case. Additionally, even if the developer was negligent, the trier of fact must apportion fault between the negligent municipality, Highland City, and the negligent developer.

Because summary judgment was granted before trial, the

jury never resolved these issues, which are critical to Highland City's theory that the developer negligently failed to cure Highland City's negligence. This cause of action should be remanded so that the trier of fact can resolve these key factual issues.

The second problem with Highland City's argument is that it assumes that because the developer negligently failed to inform the municipality of the municipality's negligence, the municipality is freed from fault. In other words, Highland City is arguing that the developer's negligence was an intervening cause which absolves Highland City of liability.

The Utah Supreme Court has held with respect to "intervening causes" that:

An intervening negligent act does not automatically become a superseding force that relieves the original actor of liability. The earlier actor is charged with the foreseeable negligent acts of others. Therefore, if the intervening negligence is foreseeable, the earlier negligent act is a concurring cause.

Godesky v. Provo City Corp., 690 P.2d 541 (Utah 1984). Also, in Harris v. Utah Transit Authority, 671 P.2d 217 (Utah 1983), the Utah Supreme Court held that "[a] person's negligence is not superseded by the negligence of another if the subsequent negligence of another is foreseeable." Id. at 219.

By arguing that the developer was an intervening negligent force, Highland City creates additional genuine issues of

material fact. A trier of fact must decide whether or not the failure of the developer to catch Highland City's negligence was a foreseeable act. If so, then Highland City's negligence is not absolved by the developer's subsequent negligence.

Thus, Highland City's argument that it cannot be held liable is contingent upon several genuine issues of material fact which have never been addressed to any trier of fact. It is improper for Highland City to make its bald statements of non-liability before this Court. Highland City must prove these issues to the trier of fact.

Highland City has never denied that it in fact negligently designed the Intersection. Highland City has also presented no evidence, legal support, or policy support which would suggest that it should be immune from its negligence.

On the basis of the foregoing, Plaintiff respectfully asserts that Highland City should not be immune from suit against allegations that it negligently designed the Intersection because it would not be immune from suit if the Intersection was a public road. As such, the trial court's entry of summary judgment should be reversed, and the case remanded.

#### POINT II-IV

##### PLAINTIFF CONCEDES THAT HIGHLAND CITY CANNOT BE HELD LIABLE FOR FAILING TO MAINTAIN OR SIGN 11500 NORTH.

In Points II through IV, Highland City argues that it had no duty to maintain and sign the Intersection. Plaintiff did not present these issues in the Statement of Issues presented in her opening brief. The reason is that after the motion for summary judgment was granted and the docketing statement was filed identifying the issues, this Court held, in Jones v. Bountiful City, 834 P.2d 556 (Utah App. 1992), that a municipality has no duty to sign public roads. However, once the municipality decided to sign a road, it had a duty to do so in a non-negligent manner. Id. at 560. Applying this principle here, it appears Plaintiff has no claim against Highland City for failure to maintain or sign the road since it was Utah County which accepted the duty to sign the road.

#### POINT V

##### UTAH CODE ANN. § 63-30-10(1)(d) (1989) RELATING TO NEGLIGENT INSPECTION BY A GOVERNMENTAL ENTITY, DOES NOT APPLY IN THIS CASE BECAUSE THE CAUSE OF ACTION DID NOT ARISE OUT OF THE NEGLIGENT INSPECTION.

Highland City also argues that its true failing in this case was not the negligent design of the Intersection, or even the negligent approval of the plat map. Instead, Highland City now

argues that its truly negligent act was that it failed to "inspect" the Intersection.

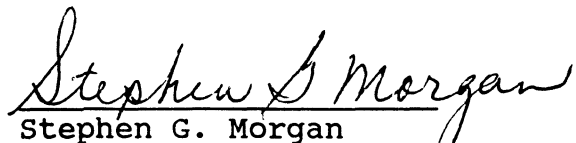
As with Highland City's contention that it was negligent in "approving" the plat, this argument must fail because the cause of action did not "arise out of" the negligent inspection. Instead, the cause of action arose out of Highland City's negligent design of the Intersection. Without undue repetition, Highland City should not be allowed to "torture the facts" of this case into a category for which immunity is retained. Ingram v. Salt Lake City, 733 P.2d 126 (Utah 1987). The efficient force that injured the Plaintiff was not Highland City's subsequent failure to discover its own negligence through inspections prior to issuance of the permit. Instead, the actual and proximate cause of Plaintiff's injuries was Highland City's negligent design of the Intersection.

#### **CONCLUSION**

Plaintiff respectfully asserts that Highland City is not immune from suit for the negligent design of the Intersection. As such, Plaintiff respectfully requests that this matter be remanded to the trial court for a trial on the merits.

DATED this 31 day of March, 1993.

MORGAN & HANSEN

  
Stephen G. Morgan  
Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that on the 31 day of March, 1993, I caused a true and correct copy of the foregoing REPLY BRIEF to be mailed, first class, postage prepaid to the following:

GARY B. FERGUSON  
WILLIAMS & HUNT  
257 East 200 South, Suite 500  
P.O. Box 45678  
Salt Lake City, UT 84145-5678

Stephen L Morgan