

2016

**Thomas K. True and Melissa L. True, Appellants, v. Utah
Department of Transportation, Appellee. : Reply Brief**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

Thomas K. True and Melissa L.
True,

Appellants,

v.

Utah Department of Transportation,

Apellee.

Appeal No. 20160704-CA

On appeal from a final judgment of the Second Judicial District Court,
Weber County, State of Utah, the Honorable Joseph M. Bean presiding

REPLY

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Addendum- Letter of June 16, 2015 from UDOT’s counsel to the district court

REPLY

1. **The issue of whether UDOT's issuance of the construction permit proximately caused Plaintiffs' accident and injuries was properly preserved.**

Defendant UDOT contends that the issue of whether UDOT's issuance of the construction permit proximately caused Plaintiffs' accident and injuries was not properly preserved in the trial court.

The basic issue of whether Defendant UDOT has immunity based on the permit exception was preserved for review. Since Judge Bean's ruling granting UDOT summary judgment, *Barneck* narrowed the scope of government immunity, utilizing a "proximate cause" standard instead of a "but for" causation standard in determining whether a permit exception applies.

On June 16, 2015, counsel for UDOT sent Judge Bean a letter advising him that the Utah Supreme Court issued a ruling in *Barneck*, which could affect the Court's decision. Counsel's letter also stated "if you choose to reconsider the motion I would like the opportunity to brief the matter..." See Addendum 1. Judge Bean did not respond. In view of defense counsel's letter and the fact that Judge Bean did not respond led Plaintiffs' counsel to believe that *Barneck* would not have changed Judge Bean's decision. Otherwise, Judge Bean would have responded and invited further briefing on the issue.

2. **UDOT is not immune from suit, as the permit exception does not apply.**

Plaintiffs hereby incorporate their Brief herein. In addition, UDOT contends that it

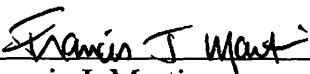
was a mere casual observer at the construction site. However, the road where the accident occurred was a state road and UDOT owed Plaintiffs an independent duty to maintain its roads in a safe condition. A UDOT inspector was required to be, and was, assigned to the project with the primary responsibility of verifying contractor compliance with the Traffic Control Plan. The inspector regularly inspected the job site, and UDOT had the ultimate authority over traffic control.

In view of *Barneck*, UDOT should not be shielded from liability when they were in fact negligent in their own right. Otherwise, the exception would swallow the rule and UDOT would enjoy limitless immunity despite the Legislature's intent to waive immunity for injuries caused by its failure to maintain its roads.

CONCLUSION

For the foregoing reasons, UDOT asks that this Court reverse the Trial Court's grant of summary judgment to UDOT.

Respectfully submitted this 30th day of March, 2017



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CERTIFICATE OF COMPLIANCE WITH RULE 24(F)(1)


1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because:

this brief contains 410 words, excluding the parts of the brief exempted by Utah R.

App. P. 24(f)(1)(B).

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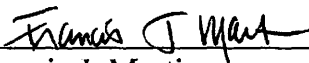


Francis J. Martin

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of March, 2017 a true and complete copy of the foregoing Reply was filed with the Court and served as follows:

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UPS overnight



Francis J. Martin

ADDENDUM 1

Letter of June 16, 2015 from UDOT's counsel to the district court

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL



RECEIVED
JUN 18 2015

BY:.....

SEAN D. REYES
ATTORNEY GENERAL

SPENCER E. AUSTIN
Chief Criminal Deputy

PARKER DOUGLAS
Chief of Staff & Federal Solicitor

BRIDGET K. ROMANO
Solicitor General

BRIAN L. TARBET
Chief Civil Deputy

June 16, 2015

Honorable Joseph M. Bean
Second Judicial District Court
2525 Grant Ave.
Ogden, UT 84401

Re: *True v. UDOT, et al.*
Case No. 110903926

Dear Judge Bean:

On June 11th, following hearing, you granted *UDOT's Motion for Summary Judgment No. 2 Re: Permit Immunity*. On June 12th, the Utah Supreme Court issued an opinion in *Barneck v. UDOT*, 2015 UT 50, --- P.3d ---, and decided an issue relevant to UDOT's motion. The Court "in a manner repudiat[ed] the but-for standard of causation" and held "that an immunity invoking condition . . . must be a *proximate* of the plaintiff's injuries in order to sustain the reinstatement of immunity." *Id.* ¶¶ 2 and 38 (emphasis in original). Attached is a copy of the decision.

Although *Barneck* narrows the scope of immunity, I believe your ruling remains correct under the new standard. Nonetheless, if you choose to reconsider the motion, I would like the opportunity to brief the matter, including the application of the inspection exception.

Sincerely,

A handwritten signature in black ink, appearing to read "SAC", written over the typed name of Steven A. Combe.

STEVEN A. COMBE
Assistant Utah Attorney General
Attorney for UDOT

sac
cc: Francis J. Martin (w/enc)
Joseph J. Joyce (w/enc)