

2003

Mark Cook and Nanalee Cook v. City of Moroni : Brief of Amicus Curiae

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MARK COOK and NANALEE COOK,	:	
Plaintiffs/Appellants,	:	
v.	:	Case No. 20030383-CA
CITY OF MORONI,	:	
Defendant/Appellee.	:	

BRIEF OF AMICUS CURIAE - STATE OF UTAH

Appeal from a Final Order of Dismissal of the Sixth
Judicial District Court, Sanpete County, State of Utah,
the Honorable K. L. McIff presiding

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LIST OF ALL PARTIES

To the best of the amicus curiae's knowledge, all interested parties appear in the caption of this Brief.

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BRIEF OF AMICUS CURIAE - STATE OF UTAH

STATEMENT OF JURISDICTION

This matter comes within the original jurisdiction of the Supreme Court of the State of Utah under Utah Code Ann. § 78-2-2(3)(j) (2002). The Supreme Court transferred this appeal to the Utah Court of Appeals on June 16, 2003 pursuant to Utah Code Ann. § 78-2-2(4) (2002).

STATEMENT OF THE ISSUES

1. The statutory immunity for injury arising out of, in connection with, or resulting from the management, construction, repair or operation of a flood or storm system does not violate the open courts provision of the Utah State Constitution.

STANDARD OF REVIEW: "In matters of pure statutory interpretation, an appellate court reviews a trial court's ruling for correctness and gives no deference to its legal conclusions." Stephens v. Bonneville Travel, Inc., 935 P.2d 518, 519 (Utah 1997).

ISSUE PRESERVED BELOW. The State of Utah agrees with the parties that this issue was raised, and ruled upon, in the trial court.

DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES

Utah Const. art. I, § 11 [Courts open - Redress of injuries]

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. § 63-30-10 Waiver of immunity for injury caused by negligent act or omission of employee - Exceptions. (Supp. 2003)

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:

...

- (13) the management of flood waters, earthquakes, or natural disasters;
- (14) the construction, repair, or operation of flood or storm systems

STATEMENT OF THE CASE

The State of Utah (Amicus Curiae) agrees with, and adopts, the Statement of the Case of the defendant City of Moroni as set out in its Brief of Appellee.

STATEMENT OF RELEVANT FACTS

The Amicus Curiae agrees with, and adopts, the Statement of Facts of the defendant City of Moroni as set out in its Brief of Appellee.

SUMMARY OF ARGUMENT

The trial court was correct in finding that the open courts provision of the Utah Constitution was not violated by the Utah Governmental Immunity Act's retention of

immunity for injuries arising out of the management of flood waters and the construction, repair and operation of a flood or storm system. The open courts provision applies only where a right to a remedy has been taken away from a plaintiff. Because the City of Moroni was performing a governmental function, and therefore entitled to immunity no matter which test is used in defining the term, the immunity act did not take away any right to a remedy possessed by the plaintiffs. When considered under the common law rule of what was governmental versus proprietary, in use at the time the statute was enacted, the City of Moroni's challenged actions meet the test for governmental function. Even if the Standiford test of "core governmental function" is used, the City's complained of conduct was a governmental function. Because no right of action has been taken away from the plaintiffs, their rights under Utah's open courts provision have not been violated.

ARGUMENT

I. IN DECIDING WHETHER THE CITY OF MORONI'S STATUTORY IMMUNITY ABROGATED AN EXISTING RIGHT OF ACTION, THIS COURT SHOULD USE THE PARKS TEST

The State of Utah agrees with the City of Moroni's argument that it is entitled to statutory immunity for the maintenance of flood waters and the construction, repair and operation of a flood or storm system pursuant to Utah Code Ann. 63-30-10(13) and (14) (Supp. 2003). As Amicus Curiae, the State of Utah submits this brief solely in response to the plaintiff's claim that this statutory immunity violates the open courts provision of the Utah State Constitution. Brief of Appellants at 10-11.

Under the Utah Supreme Court's current interpretation of the open courts provision, the first question is whether the grant of statutory immunity to the challenged conduct has taken away a right of action that existed at the time the statute was enacted. Day v. State of Utah, 1999 UT 46, ¶ 38, 980 P.2d 1171 ("The determination of whether a person who is injured in 'person, property, or reputation' has been denied a remedy by due course of law should be decided by reference to the general law of rights and remedies at the time that the Legislature abrogates a remedy."). In keeping with this requirement, the supreme court, in Ross v. Schackel, 920 P.2d 1159, 1162-64 (Utah 1996) looked at the common law as it existed before the enactment of the Governmental Immunity Act to determine if a common law remedy would have existed against a prison physician. Because the court found that no such common law cause of action existed, it found that the statute did not violate the open courts provision in granting a government employee statutory immunity.

Both the plaintiffs and the City of Moroni rely upon the Utah Supreme Court's splintered decision in Laney v. Fairview City, 2002 UT 79, 57 P.3d 1007, for trying to establish the test to be used in answering this preliminary question concerning the constitutionality of an immunity statute under the open courts provision. This reliance is misplaced. Laney was a plurality decision. Only two justices agreed completely with the test set out in the lead opinion. In his concurring decision, Justice Russon expressly stated that "I concur, but for different reasons than stated by Chief Justice Durham." 2002

UT 79 at ¶74. The remaining two justices agreed with the State of Utah’s position (as Amicus) that the current interpretation of Utah’s open courts provision is in violation of the constitutional doctrine of separation of powers. 2002 UT 79 at ¶¶85, 106-7. Because the Laney decision is splintered, the State of Utah urges this Court to instead use the test used by a united Utah Supreme Court in Parks v. Utah Transit Authority, 2002 UT 55, 53 P.3d 473.

II. THE CITY OF MORONI’S STATUTORY IMMUNITY DOES NOT VIOLATE THE OPEN COURTS CLAUSE UNDER THE PARKS TEST

In answering the initial question, whether a right to a remedy was taken from the plaintiffs by an immunity statute, the Utah Supreme Court looked at whether the governmental entity enjoyed immunity before the enactment of the statute in question. Parks, 2002 UT 55 at ¶6. The specific question to be answered here is whether the challenged action of the City of Moroni would have been considered a proprietary or governmental function before the enactment of the immunity statute. Id. (“Governmental entities engaged in proprietary functions did not come within the scope of the Act”). If the challenged conduct was a proprietary function, then the statutory immunity had taken away a right to a remedy and further open courts analysis was necessary.

In Parks, the unanimous court used a two-part test to determine if the Utah Transit Authority (UTA) was performing a governmental or a proprietary function. First, the

court looked to whether UTA was making a profit. Second, the court looked to whether UTA was in competition with private enterprise.

... UTA is not practically self-supporting and would not survive on income from its revenue-producing activities. Additionally, UTA does not compete with existing private bus lines. In fact, UTA is statutorily prohibited from competing directly with private transportation providers.

Thus the realities of operating a transit system as does UTA are that no private entity can provide capital or operating funds to establish a system with the variety of services and of the size and scope operated by UTA unless under legislative mandate. Accordingly, we hold that UTA's operation would have been considered to have been a governmental function

Parks, 2002 UT 55 at ¶¶13-14.

This two-part test is the same one used by Utah's courts before the passage of the Utah Immunity Act in 1965.

The most general test of governmental function relates to the nature of the activity. It must be something done or furnished for the general public good, that is, of a 'public or governmental character', such as the maintenance and operation of public schools, hospitals, public charities, public parks or recreational facilities. In addition to the above mentioned general test these supplemental ones are also applied: (a) whether there is special pecuniary benefit or profit to the city and (b) whether the activity is of such a nature as to be in real competition with free enterprise.

Ramirez v. Ogden City, 3 Utah 2d 102, 279 P.2d 463, 465 (1955) (footnotes omitted).

In finding that the operation of a public golf course was a governmental function under this common law test, the court explained that the most important question under the test was whether the challenged activity was in competition with free enterprise.

Even if the County profitably operated a golf course, this alone would not make it a proprietary function unless it also was in competition with private enterprise or could be operated as successfully by private enterprise.

Jopes v. Salt Lake County, 9 Utah 2d 297, 343 P.2d 728, 730 (1959); Griffin v. Salt Lake City, 111 Utah 94, 176 P.2d 156 (Utah 1947) (swimming pool that was operated as a business enterprise, including collecting sales tax on admission, and in competition with private enterprise were considered a proprietary function.).

By its nature, government flood control and storm drain systems are not in competition with private enterprise. They are not profit-making ventures and rely solely on the taxing power of the governmental entity to fund such improvements. The Utah Supreme Court has already expressly found that “no private parties can deal with flood control, as they might sewage disposal, on an individual basis.” Rocky Mountain Thrift v. Salt Lake City, 784 P.2d 459, 462 (Utah 1989) (holding that flood control activities and a city-wide storm drainage system was a governmental function).

Because the challenged actions of the City of Moroni meet the two-part test for what is a governmental function used in Parks, the trial court was correct in rejecting the plaintiffs’ constitutional challenge. This decision should be affirmed on appeal.

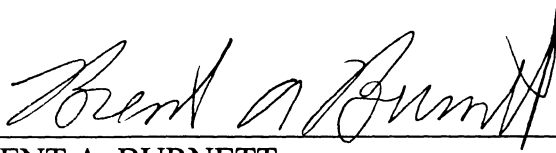
Even if this Court used the “core governmental function” test set out in Standiford v. Salt Lake City, 605 P.2d 1230, 1236 (Utah 1980) (the test used by the plurality in Laney), the result would be the same. The Utah Supreme Court, in Rocky Mountain Thrift, expressly held that managing flood waters and operating a storm drainage system

were “core governmental functions” under Standiford. Rocky Mountain Thrift, 784 P.2d at 463 (“we agree with the trial court that the design, capacity, and construction of the City Creek drainage system involved a basic governmental policy, program, or objective of flood control to protect life and property.”) Under this test as well, no right to a remedy has been taken from the plaintiffs. Because no cause of action has been abrogated, no violation of Utah’s open courts provision can be shown.

CONCLUSION

For the above stated reasons, the State of Utah, as amicus curiae, asks this Court to affirm the trial court's decision upholding the constitutionality of Utah Code Ann. § 63-30-10's grant of immunity to the City of Moroni for injuries arising out of, connected with, or resulting from the management of flood waters and the construction, repair or operation of a flood or storm system.

Respectfully submitted this 19th day of April, 2004.


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CERTIFICATE OF SERVICE

I hereby certify that I mailed two true and exact copies of the foregoing Brief of Amicus Curiae - State of Utah, postage prepaid, to each of the following on this the 19th day of April, 2004:

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