

2003

Mark Cook and Nanalee Cook v. City of Moroni : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

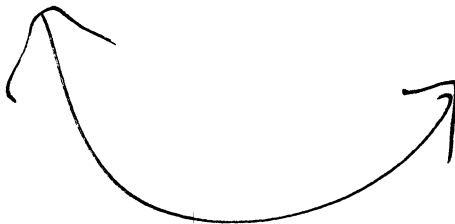
MARK COOK and NANALEE COOK	:	
	:	
Appellants,	:	
Vs.	:	Civil No. 20030383
	:	
CITY OF MORONI, a Utah municipal	:	
corporation,	:	Priority No. 15
	:	
Appellee.	:	
	:	

BRIEF OF APPELLANTS

Appeal from a Judgment entered in the Sixth Judicial District Court
Sanpete County, State of Utah Honorable Judge K.L. McIff, Presiding

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FILED
Utah Court of Appeals

FEB 19 2004

Paulette Stagg
Clerk of the Court

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PARTIES

1. **MARK AND NANALEE COOK**, Owners of property located at 12 East Main Street, Moroni Utah 84646.
2. **CITY OF MORONI** is a Utah Municipal Corporation located within Sanpete County, State of Utah.

STATUTES WHOSE INTERPRETATION IS DETERMINATIVE

§63-30-2, *Utah Code Annotated*, §63-30-10(14), *Utah Code Annotated*.

STATEMENT OF JURISDICTION

This civil appeal is within the jurisdiction of the Utah Supreme Court under § 78-2-2 (3)(a)(1953, as amended), *Utah Code Annotated* and was subsequently transferred to the Utah Court of Appeals.

STATEMENT OF THE CASE

ISSUES FOR REVIEW

ISSUE NO.1 Whether the Trial Court erred in dismissing this matter under §63-30-10, *Utah Code Annotated*.

STANDARD OF REVIEW: Trial Court's Findings of Fact are reviewed under a clearly erroneous standard. *Rule 52 (a) Utah Rules of Civil Procedure*, *Young v. Young* 979 P.2d 338 (Utah 1999), *Pennington v. Allstate Ins. Co.* 973 P.2d 932 (Utah 1998). The Court's Findings of Fact are clearly erroneous if they are so lacking in support as to be against the clear weight of the evidence. *Young v. Young* 979 P.2d 338 (Utah 1999), *Pennington v. Allstate Ins. Co.* 973 P.2d 932 (Utah 1998). Factual findings are clearly erroneous if they are not adequately supported by the record. *Taylor v. Hansen* 958 P.2d 923 (Utah Ct. App. 1998), *Bailey-Allen Co.*

v. Kurzet 945 P.2d 180 (Utah Ct. App. 1997), Gillmor v. Cummings, 904 P.2d 703 (Utah Ct. App. 1995).

To successfully challenge Findings of Fact, appellants must prove they are clearly erroneous, i.e. against the clear weight of the evidence and the findings must be sufficiently detailed and include enough facts to show the evidence upon which they are grounded.

Woodrow v. Pazzlo 823 P.2d 474 (Utah Ct. App. 1991). The findings must be articulated so that the basis of the ultimate conclusion can be understood. Jeffs v. Stubbs 970 P.2d 1234 (Utah 1998) Campbell v. Campbell 896 P.2d 635 (Utah Ct. App. 1995).

SUMMARY OF THE ARGUMENTS

At issue on appeal is whether the Trial Court erred in its dismissal of the case under Governmental Immunity.

ARGUMENT

IDENTIFICATION OF PROPERTY

The real property is located at 12 East Main Street in Moroni Utah.

BACKGROUND

Mark and Nanalee Cook are owners of real property located at 12 East Main Street, Moroni Utah 84646. Main Street in Moroni is a Utah State highway. The State of Utah has an eighteen inch drainage pipe to the north of Main Street on the opposite side of the Cook's property. The Cook's property is located at the bottom of a slope of a street where water runs down. The City of Moroni modified the drainage pipe on the south side of Main Street from an eighteen-inch pipe to a four-inch pipe.

On or about the 4th day of August 2001, a heavy rainstorm caused the drainage pipe to back up and over flow and as a result a flood occurred at the real property of Mark and Nanalee Cook. The cause of the flooding was that the four-inch drainage line was undersized and could not handle the water flow. In previous years with the eighteen-inch pipe, there was no flooding in the area. As a result of the undersized drainage line the Cook property was flooded. Moroni City was the entity which designed and installed the faulty four-inch drainage system. The Cook's property sustained considerable damage as a result of the flooding from the undersized drainage pipe. An inspection report indicates there is some structural movement taking place on the property in question. This includes a beam and the cement steps on the front porch becoming separated from the property. The home has existed for more than 100 years so this damage cannot be attributed to settlement. The water damage is the only cause for this structural damage. The home also now has a smell of mildew and mold and has a "damp" feeling to it as a result of the flooding. The estimated cost of repair for the damage to the house is approximately \$40,000 to \$50,000. Mr. Cook's physical health has also deteriorated because of the damage the water caused to the home and now is required use an oxygen tank regularly to assist his breathing.

ARGUMENT

Trial Court's Findings of Fact are reviewed under a clearly erroneous standard. *Rule 52 (a) Utah Rules of Civil Procedure*, Young v. Young 979 P.2d 338 (Utah 1999), Pennington v. Allstate Ins. Co. 973 P.2d 932 (Utah 1998). The Court's Findings of Fact are clearly erroneous if they are so lacking in support as to be against the clear weight of the evidence. Young v. Young 979 P.2d 338 (Utah 1999), Pennington v. Allstate Ins. Co. 973 P.2d 932 (Utah 1998). Factual findings are clearly erroneous if they are not adequately supported by the record. Taylor

v. Hansen 958 P.2d 923 (Utah Ct. App. 1998), Bailey-Allen Co. v. Kurzet 945 P.2d 180 (Utah Ct. App. 1997), Gillmor v. Cummings, 904 P.2d 703 (Utah Ct. App. 1995).

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Woodrow v. Pazzlo 823 P.2d 474 (Utah Ct. App. 1991). The findings must be articulated so that the basis of the ultimate conclusion can be understood. Jeffer v. Stubbs 970 P.2d 1234 (Utah 1998) Campbell v. Campbell 896 P.2d 635 (Utah Ct. App. 1995).

GOVERNMENTAL IMMUNITY DOES NOT APPLY IN THIS CASE

In determining whether the trial court properly granted a motion to dismiss, the appellate court must accept the factual allegations in the complaint as true and consider all reasonable inferences to be drawn from those facts in a light most favorable to the plaintiff. Whipple v. American Fork Irrigation Co., 910 P.2d 1218 (Utah 1996).

In the instant case the facts of the complaint are that the drainage pipe affecting the Appellants property was arbitrarily and negligently reduced from an eighteen-inch pipe, which properly allowed the water to drain without any damage, to a four inch pipe which resulted in flooding to the Appellants' property which adversely affected the health of the Plaintiff Mark Cook. It is reasonable to infer that by reducing this pipe by fourteen inches that the result would be an inadequate drainage system. It is also reasonable to infer that the actions were taken solely as a means for the municipality to save some untold amount of money. There cannot be any other reasonable inference.

Appellants are not just members of the public at large in this case as alleged by Appellee in its Motion to Dismiss. The Appellee took specific action by changing the drainage pipe in front of the Appellants' home from an eighteen-inch pipe to a four-inch pipe. This act was admitted to be negligent in the oral argument on Appellee's Motion to Dismiss. (See Memorandum Decision Page 2).

Appellee's agents knew or should have know that Appellants would be damaged due to their actions of making the drainage pipe smaller, rendering it inadequate. It is reasonable to infer that by reducing the size of the pipe from a foot and a half down to four-inches, it was foreseeable that flooding would result. The flooding was not merely the result of random flooding but was the result of Appellee's direct actions in changing the size of the drainage pipes to a smaller size. There is no evidence that the actions of the Appellee were part of an overall scheme which would take it outside the exception for governmental immunity. Appellants were not even afforded the opportunity to conduct discovery as to the events surrounding the decision to reduce the drainage pipe in front of the Appellants' home to a four-inch pipe.

By installing the smaller pipeline, Appellee knew or should have known that its actions would cause damage to Appellants' property. With this knowledge the Appellee owed a duty to Appellants to properly install the correct size drainage pipe to protect Appellants' property from the flooding which occurred.

There is no question that the drainage pipe as a part of the whole scheme would be classified as a governmental function which would allow the municipality to have immunity pursuant to §63-30-10(14), *Utah Code Annotated*.

However, the focus of this case is on one pipe which was reduced down to a four inch pipe, rendering the pipe inadequate to protect the Appellants from flood damage §63-30-10(14), *Utah Code Annotated* should not apply.

The next question which needs to be addressed is whether or not the governmental immunity as set forth in Section 63-30-10 Utah Code Annotated would apply, specifically subsection 14 “the construction, repair, or operation of flood or storm systems.” There was no evidence provided at the lone hearing in this matter that would evidence that the actions of the Appellee fell into this exception. In fact the evidence would seem that this act of negligence of the Appellees would or should have been isolated as it was the direct cause of the flooding of the Appellants property.

The statute points to the drainage system as a whole, not specific instances. There has been no evidence that the reduction of the drainage pipe in question was a part of the entire overhaul of the system. The reduction of the size of the drainage pipe was a negligent act which was done only in the context of the single drainage pipe and it should not be classified under the exception from governmental immunity.

If the Appellee truly decided that it would negligently install undersized drainage pipes as a part of the “construction, repair, or operation of flood or storm systems” then it would have effectively put the entire citizenry of the municipality at risk of increased flooding, not decrease the risk, which is arguably why the municipality engages in such conduct. If the Appellee is allowed to commit admittedly negligent acts with this blanket immunity then there is no check to stop the municipality from deciding that to save money it would be more cost effective to remove

all drainage systems and just rely upon ditches dug at the side of the road and any harm which would arise could be dismissed due to the all encompassing blanket immunity.

Therefore it is reasonable to conclude that the negligent act of installing an undersized drainage pipe was an isolated incident and therefore should be taken outside the parameters intended when Section 63-30-10(14) was adopted.

In a recent case decided by the Utah Supreme Court it was held that Section 63-30-10 Utah Code Annotated did not apply to municipalities who operated electrical power systems. The Cities decision to not raise the height of, insulate, or provide further warnings on its power lines fall within the discretionary function section of the Utah Governmental Immunity Act, Utah Code Ann. Section 63-30-10. The court further held that such immunity violated the open courts clause of the Utah Constitution. Laney v. Fairview City 57 P.3d 1007.

In the instant case dismissal would be improper due to the need to decide if under the recent rulings of the Utah Supreme Court, the duty owed by Appellee to Appellants had such a standard of care as to fall within the discretionary function exception of the Utah Governmental Immunity Act and therefore immunity would not apply. The Court in the Laney case stated that “We express no opinion on the constitutionality of the amendment as applied to other municipal activities since a lower standard of care may apply and different considerations may be relevant.”

The dismissal of this case would also be a violation of the open courts clause of the Utah Constitution.

“Amendment to Governmental Immunity Act defining ‘governmental function,’ which abrogated previously existing cause of action against municipality for negligence in connection with operation of power system, was unconstitutional as applied to operation of power system

due to violation of the open courts clause; amendment did not provide any substitute remedy, amendment was not adopted to cure a clear social or economic evil but rather to reduce liability insurance costs, and amendment was an arbitrary or unreasonable means for achieving that objective.” Laney v. Fairview City 57 P.3d 1007.

In the instant case the actions of the Appellee were similar to those of the Defendants in Laney. There was no reasonable reason given for the reduction of the drainage pipe in front of the Appellants’ property other than an economic benefit to the municipality. There is no alternate remedy for the Appellants to recover their loss. The only benefit to the municipality of this blanket immunity other than financial savings, would be to reduce their liability for the negligent act. And as such the Appellants are not afforded an opportunity to seek redress in the court’s which would violate the open court’s clause.

Appellants have a constitutional right for this matter to proceed to a trial on the merits. As stated in the Laney case “no clear social or economic evil has been specifically identified and the broad sweep of the amendment is arbitrary and unreasonable when applied to a municipal electrical power system, where a high duty of care is imposed.” *id* at page 1013.

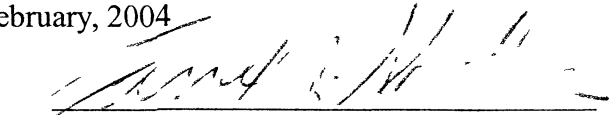
There was a similar duty of care for Appellants when the Appellee decided to install an undersized drainage pipe when it was apparent that the Appellants home would be flooded. The same logic would apply that to allow the Appellee to have governmental immunity is arbitrary and unreasonable and this matter should be remanded to the District Court for further proceedings.

Only by allowing this case to proceed with discovery and a trial can these issues be resolved. Therefore dismissal is improper and Appellee’s Motion to Dismiss should be denied.

CONCLUSION

Wherefore as the District Court erred in granting the Appellee immunity in this matter the Appellants hereby request that the Court reverse the trial court's dismissal of this matter and allow this matter to proceed.

Respectfully submitted this 7 day of February, 2004



CARVEL R. SHAFFER
Attorney for Appellant

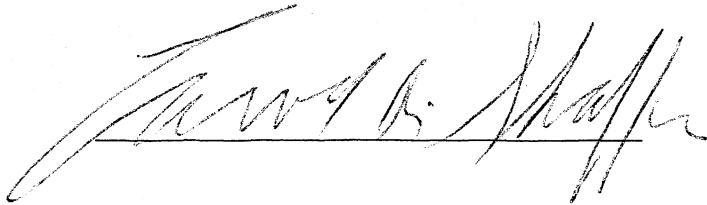
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MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Brief were sent postage prepaid or hand delivered to the parties below on this 14 day of February, 2004, to:

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450 South State
Salt Lake City, Utah 84114

A handwritten signature in dark ink, appearing to read "David L. Church", is written over a horizontal line.

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Exhibit A

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DISTRICT COURT, SANPETE COUNTY, UTAH

160 N. Main

Manti, Utah 84642

Telephone: 435-835-2121 Fax: 435-835-2135

BY *S. New* CLERK

MARK COOK and NANALEE COOK,

Plaintiffs,

vs.

CITY OF MORONI, a Utah municipal
corporation,

Defendant.

MEMORANDUM DECISION

Case No. 020600214

Assigned Judge: Kay L. McIff

Operation of a flood and storm system is a governmental function. *U.C.A. 63-30-3(3)*; *Rocky Mountain Thrift vs. Salt Lake City*, 784 P.2d 459 (Utah 1989). Governmental immunity from suit for negligence is generally waived, *U.C.A. 63-30-10 (1997)*, but an exception exists for storm systems, *U.C.A. 63-30-10(14)*.

The recent Supreme Court Decision in *Laney vs. Fairview City* 2002 UT 79, does not reach the facts of this case. *Laney* struck down the broad definition of governmental functions set forth in *U.C.A. 63-30-2(4)(a)*. Specifically, it held that the broad sweep of the definition was arbitrary and unreasonable when applied to a municipal power system. It left for another day a determination regarding other municipal activities, *Id* a page 16.

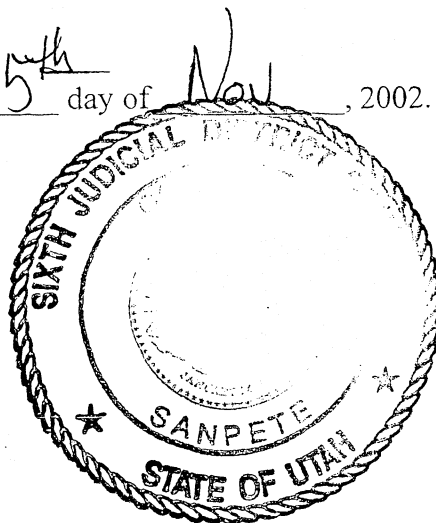
Storm systems in city streets seem quite clearly to fall under the designation of a "governmental" rather than "proprietary" function. Accordingly, *Laney* cannot save the Plaintiff's cause of action. In some respects the results here are almost more unfair than in *Laney*

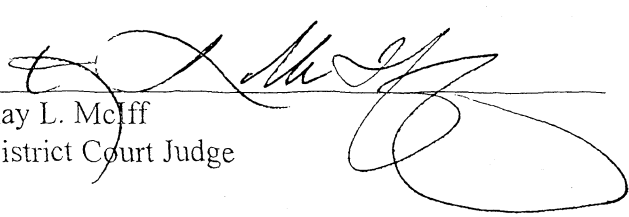
since in *Laney* the city's power line, which caused Laney's death, was 28 feet above the ground while federal regulations only required 18 feet. ¹ Here, all agree (at least for purposes of the motion to dismiss) that the storm drain line was undersized (the product of negligence) and that Plaintiff has sustained significant injury thereby. But harshness of result was not the subject of the *Laney* Court analysis. Such would require a different kind of inquiry focusing to a greater degree upon duty and fairness between citizens and their government. It would necessarily require an even greater entry into the arena which the *Laney* dissent considers "off limits" for courts and which the majority did not reach.

CONCLUSION

It is not for this Court to rewrite the statute nor to expand *Laney* into completely uncharted territory. For all the reasons aforesaid, Defendant's motion to dismiss is granted.

Dated this 15th day of Nov, 2002.



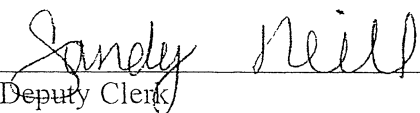

Kay L. McElff
District Court Judge

¹ This Court decided *Laney* at the district level. The Supreme Court reversed by declaring the Relevant statutory provision unconstitutional.

CERTIFICATE OF SERVICE

On the 17 day of November, 2002, a copy of the above was sent to each of the following by the method indicated:

<u>Addressee</u>	<u>Method</u> (M=mail P=in person, F=Fax)	<u>Addressee</u>	<u>Method</u> (M=mail, P=in person, F=Fax)
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Deputy Clerk