

2003

Mary cook and Nanalee Cook v. City of Moroni : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

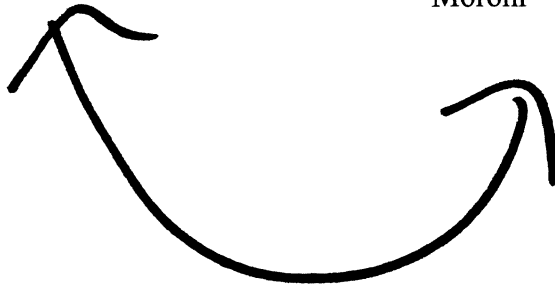
MARK COOK and NANALEE COOK	:	
	:	
Appellants,	:	
Vs.	:	Civil No. 20030383
	:	
CITY OF MORONI, a Utah municipal	:	
corporation,	:	Priority No. 15
	:	
Appellee.	:	
	:	

REPLY 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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MAY 24 2004

TABLE OF CONTENTS

Table of Authorities:	Page 3
Argument:	Page 4
Conclusion:	Page 10

TABLE OF AUTHORITIES

§63-30-10(14), <i>Utah Code Annotated</i>	Page 4, 5
<u>Rocky Mountain Thrift v. Salt Lake City</u> , 784 P.2d 459	Page 5
<u>Laney v. Fairview City</u> 57 P.3d 1007.	Page 7

ARGUMENT

THE NEGLIGENT ACTS OF THE DEFENDANT REMOVE

THIS MATTER FROM GOVERNMENTAL IMMUNITY

The facts of the complaint in this matter are undisputed, 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. By reducing this pipe by fourteen inches the result was an inadequate drainage system. These actions were taken solely as a means for the municipality to save some untold amount of money.

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).

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.

In Rocky Mountain Thrift v. Salt Lake City, 784 P.2d 459 (Utah 1989) The court was faced with a similar decision. The court was reviewing the design of the City Creek drainage system. The court stated that “ The design of City Creek drainage system is a uniquely discretionary function. Such design is the product of a balancing of policy factors including interpretation of data relevant to climate, rainfall, rates of erosion, etc., the development of appropriate design parameters and the economic resources that a community is willing to devote to a project providing a necessarily finite degree of protection... These are precisely the activities for which waiver of immunity is denied. Rocky Mountain at Page 463. The court rightly saw that the decision to control flood waters was not entitled to a blanket immunity where the overall scheme was flawed. The Court went on to state that “Inasmuch as this case was decided in the trial court on a motion for summary judgment, no full and adequate evidentiary hearing was held to resolve critical facts. Therefore, we do not have before us a record from which it can be determined who made the decisions pertaining to operation and maintenance of which

plaintiffs complain, when they were made, and under what conditions.” Rocky Mountain at page 464.

In the instant case not only are there facts before the court that the decision to change the pipe from one that was adequate to one that was not, but that also this discretionary function was made negligently which resulted in harm to the Plaintiffs. As stated in Rocky Mountain without an adequate record there are many questions which are left unanswered and as such this matter must be remanded to the trial court for a trial on the merits.

THE LANEY CASE DOES APPLY IN THIS MATTER

In the Laney case 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.

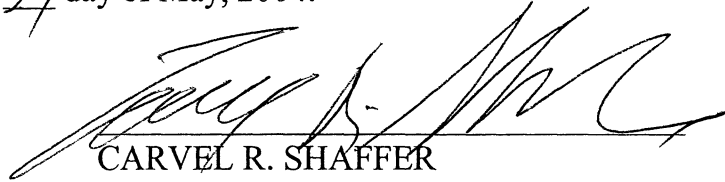
In the amicus brief filed by the State of Utah it is argued that the court should adopt a different test than that outlined in Laney. Under either test the fact still remains that the Defendant negligently installed a pipe to control expected flooding. The pipe proved to be inadequate for the purpose it was provided.

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 the Appellants the opportunity.

Respectfully submitted this 24th day of May, 2004.

A handwritten signature in black ink, appearing to read 'Carvel R. Shaffer', written over a horizontal line.

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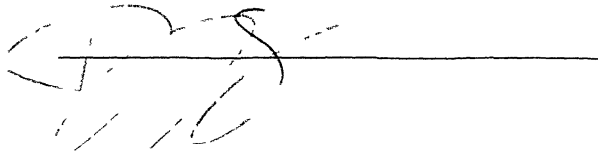
MAILING CERTIFICATE

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 ____ day of May, 2004, to:

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