

1993

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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MARGOT de VILLIERS,	:	
Plaintiff/Appellant,	:	Appeal No. 930274-CA
vs.	:	
	:	Priority No. 15
UTAH COUNTY, HIGHLAND CITY,	:	
and JOHN DOES 1-3,	:	
Defendants/Appellee.	:	

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REPLY BRIEF OF APPELLANT

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APPEAL

From the Judgment of the Fourth Judicial  
District Court in and for Utah County  
Honorable Boyd Park, District Judge

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### DETERMINATIVE STATUTES

All determinative statutes were set forth in the Brief of Appellant.

### OVERVIEW

The legal principles relating to a governmental entity's duty with respect to roads and streets are complex and a precise identification of the issues is necessary. For example, in this case, the Plaintiff has alleged that Utah County failed to warn of the dangerous Intersection.

Utah County counters this contention by arguing that it did not have a duty to install warning signs. Instead, Utah County argues that its only duty is that once it decides to install warning signs, it must do so in a non-negligent manner. This is based on this Court's holding in Jones v. Bountiful City, 834 P.2d 556 (Utah App. 1992), where this Court held:

Rather than placing a duty on municipality to erect traffic control devices, the common law requires only that once the municipality takes action to install such devices, it must do so in a non-negligent manner.

Id. at 566.

However, these principles apply only to traffic control devices at intersections. They do not state a municipality's duty to warn. The Supreme Court of Florida captured this essential distinction in Department of Trans. v. Neilson, 419 So.2d 1071 (Fla. 1982). There, the plaintiff's alleged that the State failed to install traffic control devices at an intersection and failed to

warn. With respect to the duty to install traffic control devices, the Supreme Court of Florida stated:

In our view, decisions relating to the installation of appropriate traffic control methods and devices or the establishment of speed limits are discretionary decisions which implement the entity's police power and are judgmental, planning level functions.

Id. at 1077. However, with respect to the duty to warn of the same Intersection, the Supreme Court of Florida held:

The failure to so warn of a known danger is, in our view, a negligent omission at the operational level of government and cannot reasonably be argued to be within the judgmental, planning-level sphere. Clearly, this type of failure may serve as the basis for an action against the governmental entity.

Id. at 1078.

Utah County had discretion to install traffic control devices at the intersection. But it did not have discretion to warn. It must warn. Plaintiff respectfully asserts that the distinction between traffic control devices and warning signs is critical to the resolution of this case. Those authorities relating to the duty to warn clearly indicate a duty on the part of Utah County to warn of the dangerous Intersection.

#### **ARGUMENT**

##### **I.**

#### **UTAH COUNTY HAD A COMMON LAW DUTY TO WARN MOTORISTS OF THE DANGEROUS INTERSECTION.**

Utah County argues that based on previous holdings of the Utah Supreme Court and this Court, it had no duty to warn motorists using 6000 West of the dangerous Intersection. Stevens v. Salt Lake

County, 478 P.2d 496 (Utah 1970); Jones v. Bountiful City, 834 P.2d 556 (Utah App. 1992). However, neither of these cases dealt with the duty to warn motorists and, therefore, neither is applicable here to shield Utah County from liability for its negligent actions.

Stevens dealt with an intersection between a dirt path on a vacant lot and a mainstream road. The plaintiff alleged that motorists using the dirt path and motorists using the road could not see each other in time to avoid accidents. The plaintiff in Stevens was asking Salt Lake County to "correct" or "remedy" the hazard. Stevens, 478 P.2d at 499. Utah County proceeds to argue that because a county has no duty to correct visibility problems between dirt paths and main roads, it has no duty to warn motorists of dangerous conditions caused by the intersection between two main roads.

The Plaintiff in this case has not asked Utah County to "correct" or "remedy" the hazard. Instead, the Plaintiff has alleged that Utah County should have "warned" of the hazard. The Utah Supreme Court in Stevens never addressed the issue of warning and therefore, that case cannot be used to support Utah County's contention that it had no duty to warn of the site distance problem at the Intersection.



Utah County also relies upon this Court's holding in Jones v. Bountiful City, 834 P.2d 556 (Utah App. 1992). The holding of Jones was that "[r]ather than placing a duty on a municipality to erect traffic control devices, the common law requires only that once the municipality takes action to install such devices, it must do so in a non-negligent manner." Jones, 834 P.2d at 560. Utah County extrapolates this holding to suggest that it has no duty to warn motorists of dangerous and defective conditions in its roads unless it so chooses in the exercise of its "discretion." Jones dealt with the narrow issue of whether a municipality had a duty to place traffic control devices at an intersection. Jones did not address the duty of a municipality to warn of dangerous conditions, and, therefore, is inapplicable here.

Moreover, Utah County's interpretation is inconsistent with the authorities used to support Jones. This Court relied upon McQuillin and his statement that "a city is generally not liable for failure to install traffic signs and signals." 19 Eugene McQuillin, The Law of Municipal Corporations, § 54.28b, at 90 (3d ed. 1985). However, this statements addressed only the duty to place traffic control devices at intersections. Now let's see what McQuillin had to say about the duty to warn, which is the subject of this case:

The absence of a sufficient barrier, guard, railing, light, sign, or the like in a public way, for the protection of travelers using due care who are endangered by the want of such precautions, constitutes a defect and a want of repair. Accordingly, in addition to the duty to repair, the duty of a municipality to use ordinary care to keep its streets in condition for use includes the duty, where there are dangerous obstructions, declivities, or excavations on or near the street, whether created by the municipality itself or by third persons, where it has notice thereof or notice is unnecessary, to take proper precautions to guard against accidents by the use of railings, barriers, lights, or the like, especially at night.

18 Eugene McQuillin, The Law of Municipal Corporations, § 54.90a, at pp. 334-35 (emphasis added). See also 39 Am.Jur.2d, Highways, Streets, and Bridges, § 397 (1968); Annotation, Highways: Governmental Duty to Provide Curve Warnings or Markings, 57 A.L.R.4th 342 (1987).

Utah County relies upon only selective portions of McQuillin to support its argument. It ignores those sections which directly relate to the duty to warn, sections which clearly indicate that Utah County had a duty here to warn of the dangerous Intersection.

Utah County has not provided a single case which indicates that a county has discretion to warn motorists. Stevens related to the duty to a municipality to "correct" or "remedy" hazards alongside the road. Jones dealt with the duty to erect traffic control devices at an intersection. There is absolutely no support for the contention that Utah County can choose to warn motorists of

dangerous and defective conditions in its roads and streets, or at its option subject motorists to peril.

Utah County accuses Plaintiff of using the Utah Supreme Court's decision in Richards v. Leavitt, 716 P.2d 276 (Utah 1985), to support those sections of McQuillin's treatise upon which she relies. The Utah Supreme Court stated in Richards that:

The duty of municipal corporations with respect to the maintenance and repair of traffic signals in this state is set out in 18 E. McQuillin, The Law of Municipal Corporations § 53.42 (3d ed. 1984).

Id. at 278. Utah County seems to argue that Richards can only be used as precedent to support Section 53.42. However, this Court in Jones v. Bountiful City, 834 P.2d 556 (Utah App. 1992), used the very same language which Plaintiff used in her brief to support the use of section 54.28 of McQuillin's treatise. Id. at 560 n.1.<sup>1</sup> Utah County has not been quick to attack the Jones case because it desperately relies upon that case to support its position, but attacks the Plaintiff for following the lead of this Court. Utah County's argument that McQuillin is the law of Utah only when it supports its position is misplaced, patently unfair, and should be summarily rejected.

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<sup>1</sup> Utah County compares the quotation from Plaintiff's brief with the quotation from Richards and suggests that Plaintiff intentionally misquoted the language by deleting the section from McQuillin referred to by the Court in Richards. However, this Court in Jones quoted the Supreme Court in exactly the same manner as Plaintiff did, also deleting the section number.

Utah County dismisses Bramel v. Utah State Road Comm'n, 465 P.2d 534 (Utah 1970), and Carroll v. State Road Comm'n, 496 P.2d 888 (Utah 1972), on the grounds that in both instances, the State Road Commission had placed warning signs or barriers, but the means of warning were deficient. Utah County then argues that in neither case did the Utah Supreme Court hold that a municipality had a duty to warn. But consider closely the language of Bramel:

The answer to the first proposition is to be found in applying the test found so generally throughout the law of torts, and which is also applicable here: Did the defendant Road Commission discharge its duty of exercising reasonable care under the circumstances by placing adequate and appropriate warning signs for the safety of traffic using the highway.

Bramel v. Utah State Road Comm'n, 465 P.2d 534, 536 (Utah 1970) (emphasis added). The Utah Supreme Court did not hold that the Road Commission only had a duty of "placing adequate and appropriate" warning signs at its discretion. Instead, it held the Road Commission had a duty to place warning signs. This was also the conclusion reached by the Utah Supreme Court in Carroll v. State Road Comm'n, 496 P.2d 888 (Utah 1972). Justice Ellett stated the point most clearly, concurring in Carroll:

In this case there was no place for discretion to give or not to give an adequate warning to the motoring public. The duty on the part of the State to give and maintain a reasonably adequate warning was absolute, and I am unable to see where discretion is involved.

Carroll, 496 P.2d at 892 (J. Ellett, concurring)(emphasis added). (The majority in Carroll also held that the decision as to how to warn did not involve discretion.) These cases demonstrate that once the duty to warn is addressed instead of issues surrounding intersections signs, Utah County's argument crumbles.

Utah County has never provided any public policy or other rationale for its contention that it has discretion to warn motorists of dangers on its roads. Utah County concedes that it has a duty to "maintain its county roads in a condition reasonably safe for travel." Brief of Appellee, p. 11. However, Utah County then proceeds to argue that it can, at its option, decide whether it would like to fulfill that duty by warning people of dangers. In other words, although 6000 West is not reasonably safe for travel due to the perilous sight distance problem, Utah County argues that it could chose whether or not to make the road reasonable safe for travel.

This theory represents a radical departure from traditional case law. Ordinarily, if one has a duty, he or she must take steps to fulfill that duty or he or she will be found negligent. Utah County wants a separate set of rules to be applied only to Utah County. Under these rules, Utah County has a duty to maintain its roads in a condition reasonably safe for travel, but can chose whether or not it wants to take steps to fulfill that duty. If Utah

County chooses to fulfill the duty, all the better. However, if Utah County decides at its option that it does not want to fulfill the duty, then motorists are left without a remedy. Plaintiff has been unable to find one single case which suggests that a tortfeasor has the option of choosing whether to fulfill a legal duty clearly established.

There is a complete absence of support for Utah County's contention that it had no duty to warn of the dangerous Intersection. Every authority addressing the issue has held that there is such a duty. The basis for these decisions is that a county has a duty to maintain its streets and roads in a condition reasonably safe for travel, and this duty cannot be fulfilled if motorists are not warned of dangerous perils on the road. Utah County is forced to use cases dealing with the control of intersections to support its position. These cases should not take precedence over the Utah Supreme Court's clearly stated principle that counties must fulfill their duty to keep their roads in a condition reasonably safe for travel "by placing adequate and appropriate warning signs for the safety of traffic using the highways." Bramel v. Utah State Road Comm'n, 465 P.2d 534 (Utah 1970).

## II.

### UTAH CODE ANN. § 41-6-22 (1988) REQUIRED UTAH COUNTY TO WARN OF THE DANGEROUS INTERSECTION.

Utah County argues that Plaintiff cannot assert Utah Code Ann. § 41-6-22 (1988) as a ground for relief because the issue was not raised before the trial court. However, in Buehner Block Co. v. UWC Associates, 752 P.2d 892 (Utah 1988), the appellants contended that the appellee should not be allowed to raise on appeal that a contractual provision applied because the matter was not raised before the trial court. The Utah Supreme Court held:

Appellants rely upon Bangerter v. Poulton in support of their argument that Home is precluded from claiming for the first time on appeal that paragraph 9 did not impose a bonding requirement on the bank. But application of this principle in no sense forecloses application of all other rules of appellate review. One such principle is that we may affirm trial court decisions on any proper ground(s), despite the trial court having assigned another reason for its ruling. In this case, we view the trial court as having erred in construing the parties' agreement. However, as explained below, we conclude that paragraph 9 did not impose a duty on Home, and therefore we affirm the trial court's judgment in favor of Home.

Id. at 894-95. The same case law which Utah County advances in asking this Court to consider its causation and reasonableness arguments also allows this Court to consider Utah Code Ann. § 41-6-22 (1988).

Utah Code Ann. § 41-6-22 (1988) provides:

Local authorities, in their respective jurisdictions, shall place and maintain official traffic-control devices upon highways under their jurisdiction as they find

necessary to indicate and carry out the provisions of this chapter or local traffic ordinances, or to regulate, warn or guide traffic.

Id. Utah County naturally places total reliance on the "as they find necessary" language. Plaintiff submits that this language does not confer discretion upon the county to warn. Utah County has still never explained why it has discretion to warn about dangerous conditions which render its road and streets not reasonably safe for travel. If there is a dangerous condition in the road, Utah County must warn or correct the remedy. Utah County should not be allowed to argue that it has an option to fulfill its legal duty of maintaining its streets and roads in a condition reasonably safe for travel.

### III.

#### UTAH COUNTY'S OWN STANDARD REQUIRED IT TO WARN.

Utah County argues that Plaintiff should not be allowed to argue that Utah County's own standards required it to warn because the argument was not presented to the trial court. This position is inconsistent with the Utah Supreme Court's stated principles. Buehner Block Co. v. UWC Associates, 752 P.2d 892 (Utah 1988).

The Manual on Uniform Traffic Control Devices which Utah County has accepted as its standard mandates that "[s]igns are essential where special regulations apply at specific places or at specific times only, or where hazards are not self-evident." Manual



on Uniform Traffic Control Devices for Streets and Highways, § 2A-1 (1988). There is no discretion to warn. Utah County has a duty to warn anytime there is a condition which renders the road unsafe for travel. This Manual certainly does not relieve Utah County of its common law duty to warn.

#### IV.

**UTAH COUNTY BREACHED ITS DUTY TO WARN IN THAT IT KNEW OR SHOULD HAVE KNOWN OF THE HAZARD, BUT FAILED TO REMEDY IT OR WARN MOTORISTS OF THE DANGEROUS INTERSECTION.**

Utah Court argues that summary judgment is appropriate on the issue of whether Utah County breached its duty of care. This Court has set forth guiding principles for the granting of summary judgment in negligence cases. Wycalis v. Guardian Title of Utah, 780 P.2d 821, 825 (Utah App. 1989). This Court has stated:

As a general proposition, summary judgment is inappropriate to resolve a negligence claim on its merits, and should be employed "only in the most clear cut case." . . . Of particular concern is the precept that "[o]rdinarily, whether a defendant has breached the required standard of care is a question of fact for the jury." . . . Accordingly, summary judgment is inappropriate unless the applicable standard of care is "fixed by law," and reasonable minds could reach but one conclusion as to the defendant's negligence under the circumstances.

Id. (emphasis added) Utah County is not entitled to summary judgment on the grounds that it did not breach its duty owed to Plaintiff.

Utah County argues that its actions were reasonable as a matter of law because it did not know of the dangerous Intersection. This argument is based on two principles. First, Utah County argues that it relied upon municipalities to insure that new intersections are safely attached to county roads. Second, it argues that it relied upon "accident reports, input from schools, school administrators, bus drivers, police officers, Utah Department of Transportation officials and municipalities" to inform it of dangerous conditions on its roads.

The fundamental problem with this argument is that the municipalities, school administrators, bus drivers and Department of Transportation officials are not responsible to insure 6000 West is in a condition reasonably safe for travel. Utah County has that duty. Utah County has not presented any case support for its contention that it can delegate its duty to maintain its streets and roads. The mere fact that these sources did not discover the dangerous Intersection does not relieve Utah County of its duty. Furthermore, only a jury can decide whether it was reasonable for Utah County to rely upon these sources to fulfill its duty.

Moreover, it is axiomatic that this Court considers all the evidence and inferences stemming therefrom in the light most favorable to the losing party, in this case Plaintiff. Wycalis v. Guardian Title of Utah, 780 P.2d 821, 824 (Utah 1989). Here, the

evidence is that Utah County employed a full time road inspector that inspects all roads each year. R. 520 (Affidavit of Paul Hawker, ¶ 5). 11500 North was connected to 6000 West in the early 1980's. R. 347. This accident occurred on January 18, 1990. R. 165. Thus, Utah County's road inspector would have driven over this portion of road five to eight times prior to the accident. Moreover, Officer Kerry Evans testified:

The intersection at 6000 West 11500 North is a poorly designed one in my opinion. The north bo[und] traffic and the west bound traffic cannot see each other until the No[rth] Bo[und] vehicle crests the hill. The absence of ski marks of both vehicles in this accident shows this.

R. 597. A jury would not only be justified in finding that Utah County should have known of this hazard, it might be unjustified in finding otherwise. Summary judgment should not be granted on the issue of whether Utah County breached its duty to Plaintiff.

V.

**UTAH COUNTY BREACHED ITS DUTY BY FAILING TO CONDUCT A TRAFFIC AND ENGINEERING STUDY PRIOR TO REDUCING THE SPEED LIMIT ALONG 6000 WEST.**

Plaintiff argued before the trial court that Utah County was per se negligent in that it failed to conduct a traffic and engineering study prior to lowering the speed limit along 6000 West from 55 miles per hour. Utah Code Ann. § 41-6-46 (1988). Utah County details the argument which led to this conclusion and dismisses it as "rank speculation." Brief of Appellee, pp. 25-26.

The Utah Supreme Court has recently stated principles by which an expert witness's affidavit can be used to avoid summary judgment. Butterfield v. Okubo, 831 P.2d 97 (Utah 1992); Nay v. General Motors Corp., 850 P.2d 1260 (Utah 1993). In Nay, the Utah Supreme Court stated:

In Butterfield, we held that an expert witness can defeat summary judgment by expressing conclusions as to the dispositive issues before the finder of fact and by identifying the specific grounds upon which his or her conclusions are based. Id. at 104. Only when the expert states a conclusion without identifying supporting facts will summary judgment be appropriate. Here, the Nays' expert witnesses met the Butterfield standard. Taken together, their testimony establishes a complete, specific theory of both defect and causation.

Nay, 850 P.2d at 1264.

Here, Plaintiff presented the testimony of C. Arthur Guerts, who testified as follows:

7. I have concluded that under Utah Code Ann. § 41-6-46(2)(c) (1988), the prima facie speed limit under Utah law for 6000 West from 11000 North until 11700 North should be 55 miles per hour unless an "engineering and traffic" study conducted by Utah County indicates that a lower speed is reasonable and safe.

9. In my opinion, Utah County could lawfully alter the speed limit on 6000 West from its statutory prima facie speed only "on the basis of an engineering and traffic investigation that the prima facie speed permitted under this article is not reasonable and safe under the conditions found to exist upon a highway or part of a highway."

10. In my opinion, an "engineering and traffic investigation" must include a study of the normal and average speed of motorists using the road.

11. I have learned from my review of Utah County's Answers to Interrogatories on this matter that Utah County did not conduct a speed study or other engineering and traffic investigation prior to lowering the speed limit to 35 miles per hour on the portion of 6000 West where 6000 West intersects with 11500 North.

12. I have personally examined the intersection at 6000 West and 11500 North in Utah County where the accident occurred and, in connection with my examination of the Intersection, I performed a traffic engineering study in order to evaluate the safety of the intersection. In performing my traffic engineering study, I determined that the 85th percentile speed for vehicles traveling north on 6000 West is 48.1 mph and the 85th percentile speed for vehicles traveling south on 6000 West is 50.1 mph.

16. Thus, in my opinion, if Utah County had conducted a proper engineering and traffic investigation prior to the installation of the 35 miles per hour speed limit on 6000 West, it would have discovered that corrective measures were needed to protect motorists using 6000 West from the hazard which existed due to the limited sight distance at the intersection of 6000 West and 11500 North.

R. 683 (Affidavit of C. Arthur Guerts, ¶¶ 7, 9-12, 16). Mr. Guerts' testimony clearly establishes the link between Utah County's failure to conduct a traffic and engineering study and the accident. Utah County is free to dispute these conclusions with evidence, but the Utah Supreme Court's holdings prevent summary judgment for Utah County. Indeed, Utah County has never presented any evidence refuting the conclusions of Mr. Guerts. As such, there is no genuine issue of material fact and before the trial court on remand, Plaintiff is the party eligible for summary judgment.

## VI.

### UTAH COUNTY IS NOT ENTITLED TO SUMMARY JUDGMENT ON THE ISSUE OF CAUSATION

Utah County argues that even assuming all other elements of the Plaintiff's claim are established, summary judgment is appropriate because it did not cause the accident. The Utah Supreme Court has stated that "[p]roximate cause is a factual issue that generally cannot be resolved as a matter of law. . . . Because proximate cause is an issue of fact, we refuse to take it from the jury if there is any evidence upon which a reasonable jury could infer causation." Butterfield v. Okubo, 831 P.2d 97, 106 (Utah 1992); see also Nay v. General Motors Corp., 850 P.2d 1260, 1264 (Utah 1993) ("causation issues are factual issues that generally cannot be resolved as a matter of law.")

Utah County argues that it implemented the "blind intersection" sign which Plaintiff's expert witness, C. Arthur Guerts, recommended, but this has failed to lower the speed of vehicles using 6000 West. It follows, argues Utah County, that even if the "blind intersection" sign had been in place at the time of the accident, the vehicles would have been going too fast and the accident still would have occurred.

However, Utah County has only told this Court half the story. Mr. Guerts did testify that a "blind intersection" sign should be installed. However, he also testified:

19. In my opinion, the "blind intersection" sign is insufficient to protect motorists in that the blind intersection sign is not effective in reducing the speed of motorists travelling on 6000 West.

20. In my opinion, Utah County should have identified the hazard associated with the intersection, provided corrective solutions, monitored the corrective solutions for effectiveness, and made necessary adjustments. These could include the blind intersection sign that was installed, "blind intersection" sign with flashers, or intersection flashers, or relocate the intersection to warn motorists using 6000 West of the intersection and the need for a reduction in speed.

R. 683 (Affidavit of C. Arthur Guerts, ¶¶ 19-20).

Moreover, in his deposition, Mr. Guerts testified as follows:

Q. But what I mean, is you talked about signage. Are you talking about something like a blind intersection sign, or approaching blind intersection, or what?

A. The blind intersection, I don't recall having ever seeing blind intersection as a sign in the MUTCD, but there certainly are signs that indicate intersection ahead, et cetera, and are applicable in this instance. And if they prove not to be adequate, then signs supplemented with flashers are a possibility, or a flasher itself over the intersection, all of which are corrective actions.

Q. Do you have an opinion as to whether a sign warning that you're approaching an intersection, or a sign warning you're approaching an intersection with flashers, or a flasher over the intersection, would have prevented the accident that brings us here today?

A. There's no way of making an absolute determination on that. Do I believe it would have? I believe that properly evaluated, there would have been some corrective action and there was a high probability that the accident would have been prevented.

Q. Some corrective action would have avoided the accident; is that correct?

A. Yes.

(Deposition of C. Arthur Guerts, pp 65-66) (emphasis added).

Mr. Guerts testified that if Utah County would have installed a "blind intersection" sign or a sign with flashers, or placed flashers over the Intersection, there was a high probability that this would have avoided the accident. Utah County now argues that it has installed the "blind intersection" sign and this has failed to reduce speeds along 6000 West. This fact alone would not allow this Court to assume that the other measures identified by Mr. Guerts--blind intersection sign with flashers or flashers--also would fail to reduce speeds along the road.

Once again, the Butterfield and Nay standards are applicable. The fact that Mr. Guerts has identified measures which Utah County should have implemented and that these measures would have prevented the accident is sufficient to avoid summary judgment. Moreover, Utah County should be prevented from claiming that nothing could reduce the speeds along 6000 West when it has merely implemented the simplest of Mr. Guerts' suggestions.

Finally, it should be noted that Utah County has never disputed that a "blind intersection" sign with flashers or flashers above the intersection would have prevented the accident. Utah County has not presented one affidavit placing these facts into dispute. As such, these facts stand undisputed in favor of the



Plaintiff. If anyone is entitled to summary judgment upon remand, it is Plaintiff.

## VII.

### UTAH COUNTY IS NOT IMMUNE FROM SUIT

Utah County's final argument is that it is immune from suit because: (1) it failed to inspect 6000 West; and (2) its reliance on municipalities and others to insure the safety of its roads was a discretionary act. Neither of these contentions have merit. It is clear that Utah County has waived immunity because the failure to warn constituted a "defective, unsafe or dangerous condition." Utah Code Ann. § 63-30-8 (1989).

Utah County argues that its true failure in this matter was that it failed to inspect the road to discover the unsafe condition, and therefore, immunity is retained under Utah Code Ann. § 63-30-10(1)(d)(1989). However, in order for immunity to be retained, the injury must "arise out of" the failure to inspect. Id. Here, the injury arose out of the failure to warn of the dangerous Intersection, not the failure to inspect.

Like Highland City in the consolidated portion of this appeal, Utah County readily concedes its negligence so long as it is immune from such allegations. This case is similar to Ingram v. Salt Lake City, 733 P.2d 126 (Utah 1987). There, the plaintiff alleged that Salt Lake City negligently designed the placement of

a water meter lid, for which there was no immunity. Salt Lake City argued that it was really negligent in failing to inspect the water meter lid after installation, for which immunity could be retained.

The Utah Supreme Court stated:

Salt Lake City attempts to distinguish Murray and Bowen on the grounds that in the former, the plaintiff fell into a hole on the sidewalk and in the latter, the city's maintenance of a city street was at issue, whereas here the vault was not located on a public street. Both status and case law hold otherwise, and the city may not rely on section 63-30-10(1)(d) of the Act to torture the facts of this case into the provisions of that section.

Id. at 127 (emphasis added).

Here, Utah County failed to warn. This failure was the cause of the Plaintiff's injuries. It should not be allowed to torture the facts of this case to suggest that the injury "arises out of" Utah County's failure to inspect.

The same arguments apply to Utah County's contentions that its true failure was relying upon municipalities and others to discover the hazard for it. As stated above, Utah County had a non-delegable duty to insure its roads were in a condition reasonably safe for travel. Utah County did not have discretion to rely upon these entities. It had to take care of the roads itself.

Moreover, the Plaintiff was not injured when the municipalities failed to inform Utah County about the dangerous Intersection. The Plaintiff was injured when Utah County failed to warn motorists using 6000 West of the dangerous intersection. The

injury "arises out of" this failure to warn and not out of any action by those Utah County negligently relied upon to take care of Utah County's roads.

Finally, Utah County argues that Utah Code Ann. § 63-30-8 (1989) does not apply to the instant case. That provision provides:

Immunity from suit for all governmental entities is waived for any injury caused by a defective, unsafe, or dangerous condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located thereon.

Id. Utah County argues that this provision would not apply to a "complete failure to warn." Brief of Appellee, p. 30. Utah County lists several cases which have applied Utah Code Ann. § 63-30-8 (1989), but it has not provided one case which deals with a "complete failure to warn."

Utah County's position creates a curious result. After all, Section 8 applies to a "defective, unsafe, or dangerous condition of any highway" or other public structure. Utah County's argument necessarily leads to the conclusion that a "complete failure to warn" is not a "defective, unsafe or dangerous condition." Taken to its extreme, if Utah County's road suddenly ends in a 200 foot drop into a river, assuring death, Utah County would argue that this is not a "defective, unsafe or dangerous" condition so long as Utah County provides a "complete failure to warn". Plaintiff has no way to respond to such a self-serving argument other than to suggest a

"complete failure to warn" of danger must be considered a "defective, unsafe or dangerous condition." It is difficult to imagine that the Legislature concluded that Section 8 would apply to all dangers on a road with the exception of a "complete failure to warn." One would expect that the Legislature would have at least included such a broad departure from common sense in the statute.

Moreover, Utah County's cases cannot be reconciled with its position. Utah County explains that if it placed a warning sign on the road, but the sign was knocked down, such that there was a "complete failure to warn," Section 8 would apply. However, if it never placed a warning sign on the road, resulting in the very same "complete failure to warn," Section 8 would not apply. Utah County has not explained why a "complete failure to warn" due to a fallen sign is a "defective, unsafe or dangerous condition" but a "complete failure to warn" due to Utah County's negligence is not. Utah County's argument is ingenious and furthers its self-serving purpose of retaining immunity. However, Section 8 includes all "defective, unsafe or dangerous" conditions and thus, Utah County's argument should be rejected.

Utah County also relies upon two cases to support its contentions. Valasquez v. Union Pacific Railroad, 469 P.2d 5 (Utah 1970); Gleave v. Denver & Rio Grande Western R.R., 749 P.2d 660 (Utah App. 1988). Both of these cases deal with railroad crossings

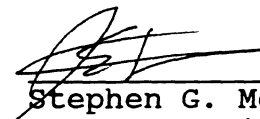
and the duty of a municipality to install traffic control devices. Again, there is a vast difference between a duty to install traffic control devices and a duty to warn. In the former, there is discretion. In the latter, there is not. Thus, these cases which do not deal with the duty to warn are simply inapplicable here and should not be relied upon.

**CONCLUSION**

On the basis of the foregoing, Plaintiff respectfully requests that the summary judgment entered in favor of Utah County be overturned, and this matter remanded for trial.

DATED this 9 day of July, 1993.

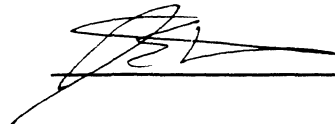
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 12 day of July, 1993, I caused a true and correct copy of the foregoing Reply Brief of Appellant to be mailed, first class, postage prepaid to the following:

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