1970

Hazel 0. Sanford v. University of Utah : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

HAZEL O. SANFORD,
Plaintiff and Respondent,

vs.

UNIVERSITY OF UTAH, an agency of the State of Utah,
Defendant and Appellant.

Case No. 12167

APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF SALT LAKE COUNTY, UTAH, HONORABLE BRYANT H. CROFT, DISTRICT JUDGE

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STATEMENT OF KIND OF CASE

This is an action for property damage arising out of flooding of plaintiff's property.

DISPOSITION IN LOWER COURT

A jury verdict was returned in favor of the plaintiff and against the defendant, University of Utah, in the sum of $13,687.00. Thereafter, upon motion made by the defendant, University of Utah, the lower court modified the judgment on the verdict and entered judgment in favor of the plaintiff and against the University of Utah for the sum of $13,187.00 with costs.

RELIEF SOUGHT ON APPEAL

The University of Utah seeks reversal of the judgment of the lower Court. The University wants an Order from this Court directing the lower Court

to enter judgment in its favor and against the plainiff, no cause of action. In the alternative, if said Order is not made, then the University wants an Order from this Court directing that a new trial be granted.

STATEMENT OF FACTS

The plaintiff, Hazel O. Sanford, is the owner of property designated as 8 North Walcott in Salt Lake City, Utah (R. 229). The University of Utah is an agency of the State of Utah, owning real property situated easterly of the plaintiff's property in Salt Lake City (Ex. 16-D). The natural drainage is from the east to the west, or from the University property toward plaintiff's lot (Ex. 24-D).

The University of Utah is the only State agency or entity designated as a defendant (R. 10). The State Building Board is charged with the responsibility under Section 63-10-7, Utah Code Annotated, as amended, 1965, with the preparation of plans, designs and specifications and the supervision over designs, construction and installation of structures at State institutions. The pertinent part of the statute is as follows:

> "63-10-7. Power and duties. — The Utah state building board shall carry out the building and expansion program of the state provided by law, as and when funds are from time to time available. The board is given power and authority to do any and all things

which in its judgment may be necessary or proper for carrying out the provisions of this chapter including, but not limited to, the following express powers and duties:

(1) To cause to be prepared in conjunction with the institutions a master plan of structures built or contemplated, and to be prepared for submittal to the governor and the legislature a comprehensive ten-year building plan for the state of Utah suggesting priority for all state institutions on the basis of present and future need. The plan shall include all proposed buildings which are to be constructed wholly or in part with state funds and all proposed repairs and alterations of existing buildings of the state and of the departments, commissions, institutions, and agencies of the state. Such plan shall include maps, information and substantiating data to support the adequacy of the plans projected, and estimates of the cost of each project.

(2) * * *

(3) * * *

(4) * * *

(5) To cause to be prepared and submitted, either by its own employees or others, designs, plans and specifications for the various buildings and improvements, and other work to be carried out by the board; to determine, with the approval of the governor, the need for all alterations and repairs to all existing buildings of the state and of the departments, commissions, institutions and agencies of the state where the estimated cost is in excess of $8,000, and to exercise super-

vision over the design, construction and installation of heating plants and appurtenances thereto in all state buildings; provided, that no building shall be constructed, improvements made or work done for, or on the property of, any state institution until the location, design, plans and specifications therefor shall be approved by the board, commission or officials charged with the administration of the affairs of such institution.

(6) * * *

(7) To make contracts for any work which the board is authorized by law to do or cause to be done; provided that in any contract for architectural or engineering services the board, as a condition of the contract, may prohibit the architect or engineer from retaining a sales or agent engineer for the necessary design work; and provided that any contract except those for professional services to be let to the lowest bidder who in the judgment of the board is responsible and qualified to do the work. The judgment of the board as to the responsibility and qualifications of such bidders shall be conclusive, except in case of fraud or bad faith. The manner of calling for bids, the kind and time of notice, the conditions thereof, and all other matters connected therewith shall be such as the board may from time to time prescribe.

(8) * * *

(9) * * *

(10) * * *

(11) * * *

(12) * * *

(13) To be sued in the name of the

Utah state building board only upon written contracts made by it or under its authority and sealed with its official seal.

(14) * * *

(15) * * *

(16) To supervise the expenditure of funds in providing plans, engineering specifications, sites, and construction of the buildings for which legislative appropriations have been made and to specifically allocate moneys appropriated where more than one project is included in any single appropriation without legislative directive. The board shall expend the amounts necessary from said appropriations for planning, engineering and architectural work. Such amounts as may be necessary to cover expenditures previously made from any building board planning fund in the preparation of plans, engineering and specifications shall be returned to said fund.

. . .

(17) * * *

(18) * * *

(19) * * *

The State Road Commission is charged with the discretion to design, build and maintain roads and parking spaces on the grounds of State institutions under Sections 27-12-7 and 27-12-8, Utah Code Annotated, as amended.

The material parts of the statutes are:

"27-12-7. General powers and duties of commission. — The commission shall administer the state highways and exercise those powers

and duties which relate to the determination and carrying out of the general policy of the state relating thereto. It shall exercise such c o n t r o l over the location, establishment, changing, construction and maintenance of highways as is provided by law.

"27-12-8. Specific powers and duties of commission enumerated. — The commission shall have the following powers and duties in addition to such other powers and duties as may be provided by law:

(1) To formulate and adopt rules and regulations and establish programs for the expenditure of public funds for the construction, improvement and maintenance of state highways, and other purposes authorized by law, and for letting contracts for any work which the commission is authorized by law to do.

(2) To determine what portion or portions of any state highway shall be improved at the expense of the state.

(3) To make agreements with the approval of the governor on behalf of the state of Utah with other states and the United States Government, or any department of the same, in any manner affecting the state highways.

(4) to (16) * * *

(17) To expend sufficient of the funds allocated to the commission to accomplish the purposes of this act."

Under Section 27-12-17, the State Road Commission is charged with the discretion to build and

maintain roads and parking spaces on the grounds of State institutions. This statute reads:

> "27-12-17. Roads and parking spaces in connection with state institutions and areas for recreational activities. — The state road commission is hereby authorized at its discretion to build and maintain roads leading to roads and parking spaces on the grounds of state institutions to which roads have not been designated by the legislature; also roads and parking spaces to serve areas used for salt flat races, ski meets, and activities which are promoted for the general welfare when such areas are in immediate proximity to a designated highway."

Section 27-12-67, designates the peripheral road of the University of Utah campus as a State highway. The pertinent part of the statute is:

> "27-12-67. State Highways — Routes 181-A to 184-A.—The following named roads to and on the grounds of state institutions are designated as state highways:
>
> (a) Route 181-A. 1.
>
> 2. From 500 South Street north via Guardsman Way to the Peripheral Road.
>
> 3. From Fifth South Street northerly via Fifteenth East Street; thence easterly and southerly via the completed portion of the Peripheral Road to Wasatch Drive; * * *"

Pictorally, Exhibit 16-D, shows the relation of the University property to the plaintiff's property, the location of State Highway 181-A on the Uni-

versity of Utah Campus running northerly from 5th South via 15th East. This exhibit depicts the Merrill Building located on the northeast corner of the intersection of the Peripheral Road and Federal Way as the area was in the Fall of 1964 and prior to the start of the construction of the parking lot, located immediately north of the Merrill Building. Exhibit 16-D does not show the construction in progress on date of the flood. No party has an exhibit showing this.

The Peripheral Road was designed by the State Highway Department (R. 503). Mr. Kimball, the Director of the Physical Plants and University Engineer in 1967 had nothing to do with the design or construction of the Peripheral Road (R. 503). Harry E. Wilbert, District Engineer for the State Highway department from 1959 to 1961 in charge of the district wherein State Highway 181-A was located, testified it was the duty of the State Highway Department to supervise, maintain and construct all State highways and that U-181-A on the University of Utah campus was designed by the State Highway Department and constructed under the supervision of the State Highway Department (R. 510). The University of Utah did not design or supervise the building of the Peripheral Road.

During 1967, the State Building Board let contracts for landscaping and construction of the parking lot north of the Merrill Building and east of the Peripheral Road. The purpose of the contract

was to increase the parking space north of the Merrill Building from 150 to 800 automobiles (R. 504). The contract for the parking lot was let by the State Building Board to Gibbons & Reed (R. 513). The parking lot was designed for the State Building Board by Karsten Hansen, a landscape architect, and the supervision of the construction of the parking lot, including installation of catch basins and drains, was done by the Utah State Building Board (R. 513). The University of Utah did not prepare the design and did not designate the manner in which construction on the parking lot was to proceed (R. 513).

In July of 1967, at the time the parking lot was under construction, a heavy rain storm struck the University of Utah campus. At 187 J Street in Salt Lake City, an area slightly west and north of the plaintiff's property, 1.88 inches of precipitation was received in a little over one hour (R. 584). When the storm struck, the catch basins had been built in the Peripheral Road at the lowest spot west of the parking lot (see Exhibit 13-T) and the parking lot was in a stage of partial completion (R. 529). When the storm struck, the parking lot was enclosed by concrete curbs along the west side. Two catch basins with drains were built. Gibbons and Reed had the rough grading complete and gravel was being hauled in to form a base for the asphalt pavement to be laid later. The storm washed the gravel into the catch basins plugging all of them and caus-

ing the flood water to overflow the west curb of the parking lot, flood down on to the peripheral road and down toward the plaintiff's property. This mud and debris then washed across the grass west of the peripheral road and onto the plaintiff's property. Exhibits 17-D to 23-D, inclusive, depict the condition between the west edge of the parking lot and the west side of the peripheral road following the flood.

Since the completion of the paving in the parking lot, there has been no further flooding of plaintiff's property. In instructing the jury, the lower court advised the plaintiff could recover for defective conditions and refused to instruct the jury that in order for the plaintiff to recover the plaintiff must show that the defective conditions were proximately caused by the negligence of the university (R. 134-155).

The university claims that in giving Instructions No. 14, No. 16 and No. 17, prejudicial error was committed.

Because the instructions are long, the university has italicized the prejudicial parts.

INSTRUCTION NO. 14

The University of Utah is an instrumentality of the State of Utah and as such is subject to the same laws regarding liability for injury as is the State or its political subdivisions, and our legislature

has provided that as of July 1, 1966, such governmental enties shall be liable for injuries resulting from activities of said entities only under specific circumstances as enumerated in our statutes.

Thus, insofar as the issues of this case are concerned, under the laws of the State of Utah, the defendant University of Utah as a governmental entity may be held liable for any injury:

> *(a) Caused by a defective condition of a culvert; or*
>
> *(b) Caused from a defective condition of any public improvement; provided such defective condition is not a "latent defective condition," as by statute no liability exists for injury caused by a "latent defective condition" in a public improvement as that term is elsewhere herein defined.*

Therefore, in order for plaintiff to recover for injuries sustained by her, she must prove by a preponderance of the evidence that her injuries, for which she herein seeks to recover, were caused by one or both of the foregoing listed alleged defective conditions. (Emphasis added)

As used in these instructions, the term "defective condition" means a condition which, though not inherently dangerous, nevertheless constitutes an unreasonable hazard, that is, a condition from which injury to those affected thereby might reasonably

be anticipated, and the term "latent defective condition" means a defective condition which could not have been discovered by careful inspection, and, as used in these instructions, the term "injury" includes damage to or loss of property, real or per-personal. (R. 148)."

The error was compounded by the giving of Instructions 16 and 17.

Instruction Number 16 reads:

"*Before you can find for the plaintiff, you must find from a prepoderance of the evidence, with respect to which the plaintiff has the burden of proof, that each of the following propositions is true:*

PROPOSITION 1: That before July 16, 1967, in constructing its improvements, the defendant changed, or caused to be changed, the natural flow for drainage of surface water from its or surrounding property.

PROPOSITION 2: That in doing so it created a drainage system.

PROPOSITION 3: That the improvement thus created had a defective condition in

(a) A culvert, and/or

(b) In the public improvement itself that was not a latent defective condition.

PROPOSITION 4: That the defendant knew, or in the exercise of reasonable care should have

known of the existence of either defective condition, if any. (Emphasis added)

PROPOSITION 5: That such defective condition, if any, caused injury to the plaintiff.

Thus, if you find from a preponderance of the evidence that each and all of the foregoing propositions are true, you should find the issues in favor of the plaintiff and against the defendant and assess damages in accordance with the instructions hereinafter given you. On the other hand, if you find from a preponderance of the evidence that any one or more of the foregoing propositions is not true, then you should find the issues in favor of the defendant and against the plaintiff of no cause of action (R.150).

Instruction Number 17 reads:

"If you find the issues in favor of the plaintiff and against the defendant, it will be your duty to award her such damages, if any, as you may find from a preponderance of the evidence, with respect to which plaintiff has the burden of proof, will fairly and adequately compensate her for any injury she has sustained because of damage to her property caused by a defective condition on defendant's improvements.

In this case, plaintiff claims damages in three categories and any recovery must be limited to an

allowance for such damages as claimed. Those categories are:

1. For personal property lost from the flood, if any, and the measure of damages for this injury is the fair market value as of July 16, 1967, of any personal property so lost.

2. For damage, if any, to property, both real and personal, resulting from the flooding water, and the measure of damages for these items is the reasonable cost of repairing each item of damage as of July 16, 1967.

3. *For diminution in value of the real property, if any, caused by a threat of future floods, if any, which such threat must arise out of a now existing defective condition in defendant's improvements.* (Emphasis added). Plaintiff would not be entitled to recover for any temporary diminution caused by existing defective conditions in the past, which diminution might disappear if such defective condition, if any, no longer exists. Thus, in considering this item of damage you must first find that any diminution of value to the property by reason of existing flood threat and caused by defective conditions in defendant's improvements now exists. If you find that such diminution does now exist, then you must limit your award to such diminution as occurred after, and did not exist on, July 1, 1966, the date upon which the

defendant's immunity from liability for injury caused by a defective condition in its improvements was terminated.

In this case, plaintiff does not seek and is not entitled to recover for any damages arising from the 1963 flood, and such damages, if any, are not a part of this lawsuit.

Plaintiff is not entitled to recover for speculative damages, by which is meant compensation for injury which, although possible, is remote, conjectural or speculative in character.

The forms of verdict furnished to you will contain a separate space for listing damages, if any, awarded in each of the three categories, and if you find the issues in favor of the plaintiff and against the defendant, you should list the amount of damages, if any, which you award with respect to each category.

The term "fair market value" means the price at which a seller, having property which he is willing to sell but was not under a compulsion to sell, could and would sell the property to a buyer who was willing to buy, but was under no compulsion to buy (R. 151)."

The University's requested instructions on negligence were denied as not applicable (R. 112).

Nowhere in the instructions was the jury told that before it could award a verdict to the plaintiff,

the plaintiff must prove by a preponderance of the evidence that the negligence of the University proximately caused the damage of which the plaintiff complains (R. 134-55).

GOVERNMENTAL IMMUNITY ACT

As the Court's ruling involved the interpretation of the Governmental Immunity Act, the following sections of the Act are set forth for ready reference:

> "63-30-3. Immunity of governmental entities from suit. — Except as may be otherwise provided in this act, all governmental entities shall be immune from suit for any injury which may result from the activities of said entities wherein said entity is engaged in the exercise and discharge of a governmental function."
>
> "63-30-4. Act provisions not construed as admission or denial or liability — Effect of waiver of immunity. — Nothing contained in this act, unless specifically provided, is to be construed as an admission or denial of liability or responsibility insofar as governmental entities are concerned. *Wherein immunity from suit is waived by this act, consent to be sued is granted and liability of the entity shall be determined as if the entity were a private person.*" (Emphasis added.)
>
> "63-30-8. Waiver of immunity for injury caused by defective, unsafe, or dangerous condition of highways, bridges or other structures. — Immunity from suit of 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."

"63-30-9. Waiver of immunity for injury from dangerous or defective public building, structure, or other public improvement — Exception. — Immunity from suit of all governmental entities is waived for any injury caused from a dangerous or defective condition of any public building, structure, dam, reservoir or other public improvement. Immunity is not waived for latent defective conditions."

"63-30-10. Waiver of immunity for injury caused by negligent act or omission of employee — Exceptions. — 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 his employment except if the injury:

(1) arises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused, or

* * *

* * *

(4) arises out of a failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property, or

* * *"

ARGUMENT

POINT I

AS THE DEFECTIVE CONDITIONS WERE NOT CAUSED OR CREATED BY PERSONS UNDER THE SUPERVISION OR CONTROL OF THE UNIVERSITY OF UTAH, IT IS NOT LIABLE.

The University of Utah is not responsible for the acts, conduct, omissions or defective conditions created or caused by other state agencies or other persons not subject to supervision or control of the University of Utah.

The peripheral road, 181-A, winding across the University of Utah property, was designed and constructed under the supervision of the State Road Commission. Under Sections 27-12-7 and 27-12-8, Utah Code Annotated, 1953, as amended, the State Road Commission is charged with the duty to establish programs for the expenditure of public funds for the construction and maintenance of the state highways. The University of Utah is not empowered to design, build or maintain State highways.

The testimony of Mr. Wilbert, District Engineer for the State Highway Department, shows the peripheral road U181-A was built by the State Highway Department and that the University of Utah had nothing to do with its design, construction or maintenance. The statement of Mr. Clayton Kimball, the University of Utah Engineer, shows the University did not design, control or supervise the

design or construction of U181-A, including the catch basins for draining off water.

The University of Utah is not empowered to design and construct buildings and other improvements on its property. The Merrill Building, the parking lot to the north of it, were designed and constructed under the supervision of the State Building Board. Actual construction of the parking lot was contracted by the State Building Board to Gibbons & Reed Construction Company. This company did all the construction except for the landscaping, which was contracted out by the State Building Board to Karsten Hansen.

The State Building Board has a duty and is empowered by Section 63-10-7(5) to cause to be prepared the design and plans for buildings and improvements on the University of Utah campus and is further empowered with the duty to make contracts for improvements under Section 63-10-7(7). The State Building Board caused the design of the Merrill Building and the parking lot to be made and it, not the University of Utah, contracted with Gibbons & Reed Construction Company and Karsten Hansen for the construction of the parking lot and the landscaping.

The University of Utah did not have any supervision over the design or construction of the parking lot, including the landscaping and design of drainage and catch basins to take water from the parking lot to storm drainage.

There is no evidence in the record to show that the University of Utah controlled the work being done by the contractors for the State Building Board or that it in any way supervised, directed or interfered with the construction undertaken by the contractors for the State Building Board.

The issue is then:

Is the University of Utah liable for defective conditions where it has no control or supervision?

Under Utah law, the employer of an independent contractor is not liable for collateral acts of negligence of an independent contractor causing damage to third persons. It is also a principle of law that where the employer has no right of control over the agent, then the employer is not responsible for the acts or omissions of the agent.

In *Callahan v. Salt Lake City*, 41 Utah 300, 125 P. 863 (1912), the plaintiff sought to recover from the Salt Lake City Corporation for damage arising from an obstructed gutter. In *Callahan v. Salt Lake City, supra*, Salt Lake City employed E. J. Moran, a contractor, to grade and pave 5th East and during the course of this work Moran obstructed the gutter so it would not carry off water and when a rain storm occurred water was diverted into the plaintiff's house. In his contract with Salt Lake City, Moran was required to do all things to prevent accidents and to execute his work in a good and substantial manner and the City reserved the

right to discharge incompetent or disorderly persons.

In deciding the *Callahan* case in favor of Salt Lake City, the Court pointed out that the City had no right to give orders or directions directly to Moran's employees and further pointed out that the nature of the work contracted out was not of the ultrahazardous or non-delegable nature and stated that hence the work to be contracted did not necessarily bring about the result and the City was not liable.

Badertescher v. Independent Ice Co., 55 Utah 100, 184 P. 181 (1919 is another early Utah case stating the test of responsibility in the employment of an agent. In this case a bicyclist while delivering papers before the daylight collided with the tongue of the defendant's wagon which was illegally parked across the sidewalk with a load of coal. The wagon was owned by the ice company and the driver was paid by the ice company and remained on the ice company's payroll and could only be discharged by the ice company. In the winter and at the time of the accident, the wagon and driver were leased to the coal company and the driver took orders from the coal company relating to delivery of coal. The trial court granted a non-suit in favor of the ice company and submitted the case to the jury on the claims of the plaintiff against the coal company. This Court affirmed the lower Court, saying the test respecting responsibility is by which company

was he employed and for whom was he acting in delivering the coal. Manifestly for that purpose, he was employed by the coal company and not the ice company and for delivering the coal he was the agent of the coal company and its employee.

Dowsett v. Dowsett, 160 Utah 12, 207 P. 2d 809 (1949) is another case pointing out that where the party has no control as to the manner in which work is performed or acts done that the employer of the agent is in a similar position as the employer of an independent contractor. In the *Dowsett* case, Darwin Dowsett was in the service in Texas and after he got quarters for his wife asked his parents to drive her to Texas. The accident occurred when his father was driving an automobile with his mother sitting in the front seat. As the father rounded a curve he lost control stating that he was blinded by the sun. There is no showing that Darwin Dowsett had any control over the manner in which the automobile was operated. In this case the Court clearly pointed out that the rendering of the service did not make master or principal responsible saying that the master or principal are responsible if the agent is subject to control as to the manner in which the service or acts constituting the agency were performed.

No Utah statute or case makes one government entity or agency the agent of another government entity or agency merely because a benefit is being conferred. The government entities operate out of

separate budgets and are empowered by statute to handle entirely unrelated governmental activities. The fact they operate on distinct and separate appropriations implies that one government entity is not the agent of another.

The Governmental Immunity Act, conveys the conclusion that one agency is not responsible for the acts or omissions of another where governmental immunity is waived by authorizing entities to purchase liability insurance separately out of their own funds.

Since the plan is for the entities to purchase the insurance and not for the state to purchase a blanket policy, the inference is that each entity is to be responsible for its own acts and ommissions and that it is not responsible for the acts or omissions of other State entities or agencies.

Section 63-30-12, Utah Code Annotated, as amended, 1965, requires notice only to the government agency concerned. Section 63-30-14, Utah Code Annotated, as amended, 1965, relating to denial of claims imports that it is the governmental entity or its insurance carrier that has the responsibility to approve or deny.

The University of Utah concedes the building of State Highway U181-A by the State Road Com-

mission is a benefit and service to the University. It also concedes that the construction of the Merrill Building, the adjacent parking lot, including catch basins and drains by contractors employed by the State Building Board and supervised by the State Building Board, is a benefit to the University.

However, as the University had no control, supervision or right of control or supervision over the design, construction of the highway, including catch basins, or the design, construction and execution of the contracted work of building the parking lot, including the design, it is not responsible under general principles of agency.

The proper parties against whom the plaintiff should have proceeded would have been the State Building Board, the State Road Commission, and their contractors, and not the University, which was not in control of the situation.

POINT II

THE LOWER COURT COMMITTED PREJUDICIAL ERROR IN FAILING TO INSTRUCT ON NEGLIGENCE.

Was it the intent of the legislature in passing the Governmental Immunity Act to put a person claiming liability for damages against the state entity in a better position that the same person would be if he were claiming damages against the private individual?

The instructions to the jury, particularly Instructions No. 14 and No. 16, were designed to allow

the plaintiff to recover without showing negligence on the part of the university in creating or causing the creation of the defective condition. As such, the instructions imposed a higher standard of care on the university than would have been imposed on a private person under the same circumstances or would have been imposed on cities and towns for which immunity is waived under the prior statute, §10-7-77 Utah Code Annotated, 1953.

Section 63-30-4 of the Immunity Act provides that it is the intent of the legislature to put a claimant against a government entity in the same position as if his claim were against a private individual.

Private persons in Utah are not strictly liable for defective conditions. A private person must be shown to be negligent in proximately causing a defective or dangerous condition before liability exists.

In *Rhiness vs. Dansie,* 472 P.2d 428 (Utah 1970), a gate to the defendant's horse pasture was found open after the vehicle in which the plaintiff was riding collided with one of the defendant's horses on the highway. The court said the mere fact that the animal escaped from the enclosure was not sufficient evidence to create a jury question on negligence or liability. Leaving the gate open made the enclosure of the horses effective.

In *Robison vs. Robison,* 16 Utah 2d 2, 394 P.2d 876 (1964), blasting was being done in a remote farm area where there was little likelihood of in-

juries to persons and the plaintiff was injured when rocks were thrown against them by a dynamite explosion. This court in affirming a judgment for the defendant said the defendant was not liable unless the likelihood of injury was foreseeable and refused to apply the law of strict liability for this dangerous activity.

Utah refuses to hold the owner of property strictly liable for the spread of fire. In *Hanks vs. Christensen,* 11 Utah 2d 8, 354 P.2d 564 (1960), the defendant started a fire, depending on a fire break, to protect against its spread. A wind came up and the fire spread over the break. This court said that the plaintiff in order to recover must prove negligence and refused to allow recovery on the basis of strict liability for the spread of fire and affirmed a judgment in favor of the defendant, no cause of action.

With respect to abnormally dangerous conditions or activities, the doctrine of strict liability as originally stated in the case of *Rylands vs. Fletcher,* 3 H & C 774, 159 Eng. Rep. 737, 3 H.L. 330 (1868), is not the law in Utah. In *Rylands vs. Fletcher* the defendants, mill owners in Lancashire, constructed a reservoir upon their land then water broke through from the reservoir into a disused mine shaft and flooded connecting passages into the plaintiff's adjoining mine. The actual work was done by independent contractors who were probably negligent and the defendants were ignorant of the old mine

workings and free from all personal blame. Strict liability was held upon the theory that the storage of water constituted an absolute nuisance and the court pointed out that storage of water in this situation was inappropriate in a mining country.

The construction of a parking lot was appropriate and was a necessity on the University of Utah campus.

As the cases involving the escape of animals, fire, and blasting show private persons in Utah are not strictly liable for dangerous or defective conditions or extrahazardous activities, the University of Utah in accordance with legislative intent expressed in §63-30-4 of the Immunity Act should not be held strictly liable for dangerous or defective conditions.

Section 63-30-13 of the Immunity Act provides that claims against a city or town shall be governed by the provisions of §10-7-77 Utah Code Annotated, 1953.

In *Niblock vs. Salt Lake City*, 100 Utah 573, 111 P.2d 800 (1941), the plaintiff tried to impose liability on Salt Lake City by showing his damage was caused by the defective and unsafe and dangerous condition of the street. In commenting on the plaintiff's contention the court said that the obstructed condition of the street gives rise to no liabiliy as the city has taken proper precautions such as the erection of adequate barriers and warn-

ings and stated that negligence must be shown to establish liability.

In later cases cited under §10-7-77 Utah Code Annotated, 1953, as amended, as a condition for recovery each plaintiff has been required to show negligence and not merely a defect in the street. In *Wilson vs. Salt Lake City,* 13 Utah 2d 234, 371 P.2d 644 (1962), where a manhole was missing, the plaintiff was required to show negligence on the part of the city in failing to replace the manhole cover. Again in *Nyman vs. Cedar City,* 12 Utah 2d 45, 361 P. 2d 1114 (1961, where a guest in an automobile brought an action against the city for injuries incurred when the automobile in which she was riding ran into an unmarked street obstruction consisting of a row of dirt with a protruding culvert proof of negligence was required.

Other state Governmental Immunity Acts limit liability for dangerous or defective conditions to negligence. Section 53-05-1 of the California Government Code provides:

> "A local agency is liable for injuries to persons and property resulting from the dangerous or defective use of public property if the legislative body, board or person authorized to remedy the condition:
>
> a. Have knowledge or notice of the defective or dangerous condition.
>
> b. For a reasonable time after acquiring knowledge of receiving notice of failure to rem-

edy the condition or to take action reasonably necessary to protect the public against the condition."

The California Court of Appeals in *Gentekos vs. City and County of San Francisco*, 329 P.2d 943 (1958), said as a condition to recovery the plaintiff must show that there is:

1. A dangerous or defective condition.

2. That the city had knowledge and notice of the defective condition.

3. That the condition must exist a reasonable time after acquiring such knowledge so that the city has a reasonable opportunity to repair the condition.

California has not interpreted its act to make a government entity strictly liable for defective conditions.

In summary the University of Utah submits it should not be held liable for a defective condition without negligence because:

A. Private individuals in Utah are not liable for defective conditions without negligence.

B. Under §10-7-77 cities and towns are not liable for defective conditions without a showing of negligence.

C. No intent is expressed in the Governmental Immunity Act to make a governmental entity strictly liable for dangerous or defective conditions.

POINT III

THERE IS NO WAIVER OF GOVERNMENTAL IMMUNITY.

The operation of a school is a governmental function. *Campbell vs. Pack and Granite Board of Education*, 15 Utah 2d 161, 389 P.2d 464 (1964).

The Governmental Immunity Act, chapter 30 of title 63, does not provide waiver of immunity for claims arising for maintenance of a nuisance. It is also specifically provided in the Governmental Immunity Act §63-30-10 that immunity is not waived for damages arising from the performance or failure to perform a discretionary function and for damages arising out of the failure to make an inspection or by reason of making an inadequate or negligent inspection of property.

Prior to adoption of the Governmental Immunity Act the construction, maintenance and operation of streets, storm sewers and drainage systems were governmental functions and therefore not actionable. See *Wilkinson vs. State*, 42 Utah 483, 134 Pac. 626 (1913); *Cobia vs. Roy City*, 12 Utah 2d 375, 366 P.2d 986; *Reeder vs. Brigham City*, 17 Utah 2d 398, 413 P.2d 300 (1966).

Section 78-30-1 Utah Code Annotated, 1953, defines nuisance as an obstruction to the free use of property so as to interfere with comfortable enjoyment of property. In *Reeder vs. Brigham City*, supra, the city collected water in a storm drain and

caused the water to be dumped on the plaintiff's property. The lower court granted an injunction against the city and allowed the plaintiff damages. On appeal this court reversed the judgment for damages holding that governmental immunity had not been waived for liability arising from the nuisance.

If the maintenance of the parking lot constitutes a threat to the plaintiff's property, it is a nuisance.

There is no specific waiver of immunity in the Governmental Immunity Act for liability arising from maintenance of a nuisance and as §63-30-3 specifically provides there is no waiver of immunity except as otherwise provided in the act the university submits it was unreasonable for the lower court to hold immunity was waived for liability arising out of defective conditions in the peripheral road or the parking lot.

The exceptions in §63-30-10 to the waiver of immunity as the performance of the discretionary function or the failure to perform a discretionary function raise a question as to what is or is not a discretionary function.

In *Rollow vs. Ogden City*, 66 Utah 475, 243 Pac. 791 (1926), this court said in locating and opening streets and regulating travel a city was engaged in the exercise of a discretionary function. There is no Utah case discussing whether or not the design and construction of a parking lot is a discretionary function. However, in *Velasquez vs.*

Union Pacific Railroad Co., 24 Utah 2d 217, 469 P.2d 5 (1970), a case where a passenger in a pickup truck brought an action against the State of Utah Public Service Commission and the Union Pacific Railroad claiming the Public Service Commission had a duty to protect the public by requiring proper and adequate safety devices at the railroad crossing and that the Public Safety Commission was negligent in that it did not require the railroad to install an adequate protective device and to establish a program to discover dilapidated signs, hence inspecting the property to locate defective conditions. This court said even if it were assumed that the failure to have the most improved warning signs at the railroad crossing were a defect in the highway, immunity was not waived under §63-30-8 as it was the discretionary function on the part of the Public Service Commission to determine what signs the law required at railroad crossings.

Under the Federal Tort Claims Act, 28 U.S.C. §§2671-80 there is a general waiver of sovereign immunity as to all tort claims except those arising within specified categories. One of the excepted categories relates to claims based upon the exercise or the performance or the failure to exercise and perform a discretionary function on the part of the federal agency. The federal cases involving this exclusion generally hold that where the nature of the undertaking itself covers the damage there is no waiver of sovereign immunity.

In *Boyce vs. United States*, D.C. Ill. 93 F. Supp. 866 (1950), a case involving property damage arising from blasting by the corps of engineers, the court said that since the plans for the project had been approved by the chief of engineers and the work had been done accordingly with a discretionary function involved that the claim of the plaintiff was barred.

In *Coates vs. United States*, 8 Cir. Mo, 181 F.2d 816 (1950), the court affirmed a decision denying recovery to the plaintiff who alleged that their land and crops had been damaged by an unusual overflow of the river resulting from the changes the government made, saying that the Federal Tort Claims Act was specifically designed to preclude the possibility that the government might be held liable for an action growing out of an authorized activity such as flood control or irrigation projects.

In *United States vs. Ure*, 9 Cir. Ore. 225 F.2d 709 (1955), the court held that whether or not to line a canal with concrete in certain areas and not line it with concrete in other areas was clearly a discretionary function and the claim of the plaintiff was barred.

In *California vs. United States*, D.C. Cal. 146 F. Supp. 341 (1956), the state's complaint was dismissed in which it was alleged the state highway was damaged as a result of the collection of surface waters thereon allegedly as the result of the govern-

ment's negligence in the construction of a canal, pipeline, culverts, ditches and channels, all a part of a government recreation project, the court saying that the alleged injury was the result of the discretionary function on the part of the United States to which immunity from suit had not been waived.

North vs. United States, D.C. Utah 94 F. Supp. 824 (1950), involved a claim for the plaintiff for damage to flooding of a cellar and cesspool because of the construction of a dam which raised the water table in the area. The United States District Court held that the interference of the free and natural underground flow of ground waters invloved the exercise of a discretionary function and stated that no recovery could be had.

In *Sisley vs. United States*, D.C. Alas. 202 F. Supp. 273 (1962), a claim was made for damage to a claimant's property due to the interruption of the natural flow of surface water away from it. It was claimed that in building the highway the United States had caused the roadway to be compacted so as to prevent the flow of water under it and failed to provide adequate culverts for surface drainage. Recovery was denied on the ground that immunity was not waived for the participation of the United States in the construction of a public highway.

In *Mahler vs. United States*, 3 Cir. Pa. 306 F.2d 713 (1962), certiorari denied, 371 U.S. 923, 9 L. Ed. 231, 83 Sup. Ct. 290, recovery was denied to a claim-

ant wherein he suffered damages when his vehicle collided with a boulder on the highway. The claimant contended the government was liable for his damages inasmuch as the Secretary of Commerce had approved defective plans for the highway project and had failed to discover faulty construction and had failed to make an inspection after construction was completed. In affirming a judgment in favor of the government, the court said that to approve plans and designs, along with participation with the state in building the highway was a discretionary function, not an operation function and that immunity was not waived.

The inclusion of subparagraph 4 of §63-30-10 excepts state entities from liability that arises out of their failure to make inspections of property. The University of Utah submits that the inclusion of this subsection was for the purpose of making it clear that the university had to have notice of a condition that was defective or dangerous and that government entities had no affirmative duty to constantly inspect propery so as to locate dangerous or defective conditions. This court should follow *Velasquez vs. Union Pacific Railroad Co.*, supra, in interpreting the act to require the exceptions in §10 to apply to defective conditions. To hold that the exceptions in §10 of the Immunity Act do not apply to §§ 8 and 9 of the act relating to dangerous or defective conditions, will emasculate the effect of the exceptions in §10. Claimants would avoid the excep-

tions in §10 merely by bringing suit against the state agencies for the dangerous or defective condition and not for the negligence of employees. Is it reasonable to believe the legislature intended a state agency to submit to liability for a dangerous defective condition without notice where it was specifically provided in the act under §10 it should not be liable for the failure to inspect state property or by reason of making an inadequate or negligent inspection? The answer is no. It seems more reasonable to believe that subparagraph 4 in §10 was included to show that a state agency had no duty to inspect highways to see that they were not icy, that curves were not too sharp, that guardrails were proper and that chuckholes or other hazards did not exist. The purpose of subsection 4 of §10 appears to be to support and enforce the discretionary function exception and to limit the agencies' liability for defective conditions of which it had actual notice.

CONCLUSION

The judgment of the lower court should be reversed because:

1. The defective conditions were not caused or created by persons under the supervision or control of the University of Utah.

2. The University of Utah is not an insurer against injury nor is it strictly liable for damages arising from defective or dangerous conditions.

3. There is no waiver of immunity for damages arising from a nuisance.

4. The failure of the University of Utah to discover the plugged catch basins and drains arises from its failure to exercise a discretionary function or from its failure to inspect property for which immunity is not waived.

5. The lower court committed prejudicial error in instructing the jury that the University of Utah was liable for dangerous or defective conditions not arising from negligence.

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MAILING NOTICE

I hereby certify by United States Mail, postage prepaid, I mailed two copies of the foregoing brief to Mulliner Prince & Mangum, Attorneys at Law, 206 El Paso Natural Gas Building, Salt Lake City, Utah 84111, this ..... day of October, 1970.

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Raymond M. Berry