

2006

# Daniel Grappendorf, et al., v. City of Pleasant Grove, et al., : Reply Brief

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Peter Stirba, Gary R. Guelker; Stirba & Associates; attorneys for appellee.

Edward P. Moriarity, Bradley L. Booke, Robert D. Strieper; Moriarity, Badaruddin & Booke; attorneys for appellants.

---

## Recommended Citation

Reply Brief, *Grappendorf v. Pleasant Grove*, No. 20060461 (Utah Court of Appeals, 2006).

[https://digitalcommons.law.byu.edu/byu\\_ca2/6535](https://digitalcommons.law.byu.edu/byu_ca2/6535)

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

[http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

*Distorted*

---

IN THE SUPREME COURT OF THE STATE OF UTAH

---

DANIEL GRAPPENDORF, et al.,

Plaintiffs /Appellants,

vs.

CITY OF PLEASANT GROVE, et al.,

Defendants /Appellees.

Case No. 20060461-SC

---

REPLY BRIEF OF THE APPELLANT

---

ON APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

The Honorable JAMES R. TAYLOR, Presiding

Trial Court Case No. 030404102

---

PETER STIRBA  
GARY R. GUELKER  
*STIRBA & ASSOCIATES*  
215 South State, Suite 1150  
P.O. Box 810  
Salt Lake City, UT 84111-0810  
Telephone: (801) 364-8300  
Facsimile: (801) 364-8355

Attorneys for Defendant & Appellee

EDWARD P. MORIARITY (5622)  
BRADLEY L. BOOKE (9984)  
ROBERT D. STRIEPER (10145)  
*MORIARITY, BADARUDDIN &  
BOOKE*  
341 South Main Street, Suite 406  
Salt Lake City, UT 84111  
Telephone: (801) 326-8090  
Facsimile: (801) 521-0546

Attorneys for Plaintiffs & Appellants

FILED  
UTAH APPELLATE COURTS

NOV 14 2006

---

**IN THE SUPREME COURT OF THE STATE OF UTAH**

---

DANIEL GRAPPENDORF, et al.,

Plaintiffs /Appellants,

vs.

CITY OF PLEASANT GROVE, et al.,

Defendants /Appellees.

Case No. 20060461-SC

---

**REPLY BRIEF OF THE APPELLANT**

---

**ON APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH**

**The Honorable JAMES R. TAYLOR, Presiding  
Trial Court Case No. 030404102**

---

PETER STIRBA  
GARY R. GUELKER  
*STIRBA & ASSOCIATES*  
215 South State, Suite 1150  
P.O. Box 810  
Salt Lake City, UT 84111-0810  
Telephone: (801) 364-8300  
Facsimile: (801) 364-8355

Attorneys for Defendant & Appellee

EDWARD P. MORIARITY (5622)  
BRADLEY L. BOOKE (9984)  
ROBERT D. STRIEPER (10145)  
*MORIARITY, BADARUDDIN &  
BOOKE*  
341 South Main Street, Suite 406  
Salt Lake City, UT 84111  
Telephone: (801) 326-8090  
Facsimile: (801) 521-0546

Attorneys for Plaintiffs & Appellants

## TABLE OF CONTENTS

Table of Contents .....	i
Table of Authorities .....	ii
Argument .....	1
Conclusion .....	5

**TABLE OF AUTHORITY**

Blackner v. Dept. of Transportation,  
2002 UT 44, 48 P.3d 949 .....2, 3

## ARGUMENT

**REGARDLESS HOW THE NATURAL CONDITION IS DESCRIBED, THERE SHOULD BE NO IMMUNITY WHEN A NEGLIGENT GOVERNMENTAL ACT *PRECEDES* A NATURAL CONDITION AND *CREATES* THE DANGER THAT CAUSES INJURY.**

As if governmental immunity should turn on the *strength* of the wind that blew in Pleasant Grove on the day of Daniel Grappendorf's death, Appellee's brief spends much time characterizing the wind---albeit inaccurately.<sup>1</sup> Whether the

---

<sup>1</sup> The record below contains varying and inconsistent descriptions of the wind:

1. The trial court determined a "forceful gust of wind lifted the [pitching] mound, causing it to strike Daniel Grappendorf who sustained fatal injuries." (Record on Appeal (*hereinafter* "R."), at 1053).

2. Plaintiff's Response in Opposition to Defendant Pleasant Grove City's Motion for Summary Judgment characterized the wind as "a very strong wind." (R. at 0511).

3. The responding officer, Steve Brande's, report, attached to Grappendorf's Opposition as exhibit 11, reported the wind as merely "a wind gust." (R. at 370).

4. Responding officer, Kurt Bean, referred to the wind as " a large wind." (R. at 357).

5. A June 24, 2002 article in the Salt Lake Tribune, reporting on Daniel Grappendorf's tragic death, referred to the wind as a "extremely strong gust of wind." (R. at 354).

6. Defendant Pleasant Grove City's Memorandum in Support to Motion for Summary Judgment, paragraph 8, states, "at approximately 7:55 p.m. a summer weather disturbance accompanied by extremely high wind gusts began to enter the Diamonds area." (R. at 258).

7. Pleasant Grove's Memorandum, paragraphs 11 and 12, converts "extremely high wind gust" to "microburst." (R. at 258-259)

8. In the Fact section of Appellee's Brief, citing the record at 239, 242, Brief of Appellant at Page 9, and the trial courts Memorandum Decision at 1053, Pleasant Grove converted the language from variations of a "gust of wind" to a "Microburst," in particular:

result of intentional misdirection or simply misunderstanding, Appellee's brief misses the point.

Insofar as it is of consequence, relying on Blackner v. Dept. of Transportation, 2002 UT 44, 48 P.3d 949, the trial court herein specifically found that a "gust of wind" was the cause of Daniel Grappendorf's death. This finding allowed the trial court to invoke the "natural condition" exception to the waiver of immunity provided in the Governmental Immunity Act.

But therein lies the trial court's error. It was not a gust of wind that caused Daniel Grappendorf's death. It was the failure of the City of Pleasant Grove to properly secure a pitching mound that caused Daniel's death.

- 
- a. The record at 239, the wind is described as "this big gust of wind";
  - b. The record at 242, the wind is described as "gentle breeze and then a harder breeze and full gust of wind."
  - c. The record at 1053, trial court's Memorandum Decision, describes the wind as ". . . a forceful wind gust lifted the mound, causing it to strike Daniel Grappendorf who sustained fatal injuries. Other facts recited in the briefing on this motion are immaterial." Pleasant Grove Brief converted the courts description at Paragraph 9, into "the trial court granted Pleasant Grove's Motion for Summary Judgment, finding that the microburst gust of wind was the cause of Daniel Grappendorf's death, thereby finding the undisputed facts of the case fall within the 'natural condition' exception to the Governmental Immunity Act." The trial court never found there was a microburst of wind. (Brief of Appellee fact sections, pages 5-6, paragraphs 3,7,8,9 and 10).

In Blackner, the avalanche was the cause in fact of the plaintiff's injuries--- the plaintiff was struck and injured by moving snow. Thus, the conclusion that the "natural condition" exception applied made both common and physical sense.

In the instant case, the wind did not decapitate Daniel Grappendorf. Rather, the negligently-anchored pitching mound, which is certainly *not* a "natural condition," was the instrumentality of Daniel's death.

In Blackner, the Supreme Court of Utah did not consider the degree, size, shape, speed, velocity, or distance the "natural condition" (an avalanche) traveled. Rather, the Blackner decision held that *because of* a natural condition, a police officer stopped vehicular traffic in a dangerous location. Id. at ¶¶ 14-15. Thus, the natural condition in Blackner preceded and caused an otherwise reasonable governmental act---stopping traffic---to *become* a negligent act.

Blackner's "but for" test did not consider the physics of avalanches, and Appellants respectfully submit that this Court should not follow a rule that relies upon measuring the order of magnitude of a natural condition. Such an approach would render unconstitutional the Governmental Immunity Act as violative of the open courts clause, the petition clause, and the wrongful death cause of action guarantee of the Utah Constitution---because a "natural condition" could be found to be the cause of injury with *every* act of governmental negligence.



In the instant case, the governmental act was *never* a safe or reasonable act. The pitching mound should *never* have been stored standing up on its edge. This fact is improperly omitted from the trial court's reasoning.

Thus, the trial court incorrectly applied the Blackner "but for" test when (apparently) concluding that the pitching mound was the cause of the injury. The analysis is wrong, it is unsupported by the record, and it erroneously depends, in essence, on the speed of the wind.

Such an application/interpretation of the statute is erroneous because (a) it ignores the sequence of events, that is, here, that the negligent governmental act *preceded* the natural condition (opposite the sequence in Blackner) and (b) it demands a virtually impossible proof.

For example---under the trial court's application of the statute---had the wind been a two-mile an hour gust and the mound simply tipped over and crushed a child---Pleasant Grove would be immune because, "but for" the wind, the mound would not have tipped over. Yet, gentle breeze blows everywhere and always, so the legislature could not have intended that such a "natural condition" would save the government from its own carelessness. Even more absurdly, under the trial court's application of the statute---had there been no wind at all and the mound simply fell because its strap handle broke, then gravity would, in fact, be the

natural condition that caused the mound to fall---and Pleasant Grove would still be immune.

To avoid this absurd result, the rule should be---as is implicit but not expressed in Blackner---where a negligent act or omission precedes a natural condition and thereby creates a danger that proximately causes injury, the natural condition exception to the waiver of governmental immunity should not apply.

**CONCLUSION**

For these reasons and those set forth in Appellant's Opening Brief, the Grappendorfs respectfully request that this Court reverse the trial court's grant of summary judgment and remand this case for further proceedings.

Respectfully submitted this \_14\_ day of November 2006.

MORIARITY, BADARUDDIN & BOOKE




BRADLEY L. BOOKE  
ROBERT D. STRIEPER  
*Attorneys for Appellants*

CERTIFICATE OF SERVICE

I hereby certify that on the 14 day of November, 2006, I caused the original and nine copies and one CD of the foregoing REPLY BRIEF OF THE APPELLANTS to be filed with the Clerk of the Supreme Court, and two copies to:

PETER STIRBA  
GARY R. GUELKER  
*STIRBA & ASSOCIATES*  
215 South State, Suite 1150  
P.O. Box 810  
Salt Lake City, UT 84111-0810

  
\_\_\_\_\_