2006

Charles F. Barenbrugge and Belinda Barenbrugge v. State of Utah and Utah Department of transportation : Reply Brief

Utah Court of Appeals

No. 20060730-CA

IN THE UTAH COURT OF APPEALS

CHARLES F. BARENBRUGGE AND BELINDA BARENBRUGGE,

Plaintiffs and Respondents,

v.

STATE OF UTAH and UTAH DEPARTMENT OF TRANSPORTATION,

Defendants and Petitioners.

Reply Brief of Defendants/Petitioners

Interlocutory appeal from an order denying a motion for summary judgment of the Third Judicial District Court, Salt Lake County, the Honorable Anthony Quinn presiding

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ANDERSON & KARRENBERG
Nathan B. Wilcox
Stephen P. Horvat
50 West Broadway
700 Chase Tower
Salt Lake City, Utah 84101
Attorneys for Plaintiffs/Respondents

J. CLIFFORD PETERSEN (8315)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Utah Attorney General
160 East 300 South, Sixth Floor
PO Box 140856
Salt Lake City, Utah 84114-0856
Telephone: (801) 366-0100
Attorney for Defendants/Petitioners

ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

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Utah Attorney General
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PO Box 140856
Salt Lake City, Utah 84114-0856
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Argument

Defendants are statutorily immune from suit because the injury arose from the construction, repair, or operation of a storm system

Water on the road is the key fact linking the accident to the storm system. Because both the accident and the storm system directly relate to draining water from the road, they are causally linked to each other. The accident is linked to the water by the Barenbrugges' allegation that the accumulation of water caused the accident. R. 2. In turn, the water is linked

to the storm system by undisputed evidence that the system "encompass[ed] the entire accident site" and was "maintained by the State for draining water from the surface of the road." Pet. Brf. at 6 (Stipulated Statement of Undisputed Facts). Yet the Barenbrugges insist that the system installed to *drain water from the road* has no causal relationship with their claim that the State negligently failed to *drain water from the road*. This argument fails because of the direct causal relationship the water has to both the accident and the storm system. The Barenbrugges also misread the holding in Cook v. City of Moroni, 2005 UT App 40, ¶ 8, 107 P.3d 713. There, this Court did not create a causal distinction between water flowing from a storm system and water unable to flow into a storm system. Because the accident and the storm system here are causally linked to each other, immunity applies. See Blackner v. Dep't of Transp., 2002 UT 44, ¶ 15, 48 P.3d 949 (holding that the "arises out of" language in the immunity act "requires only that there be *some* causal nexus between the risk and the resulting injury").

Without any supporting evidence below, it is mere speculation to suggest what causal connection would exist if the accident happened at a different location, farther from the nearest drainage box. The Barenbrugges did not present evidence disputing the State's evidence that the drainage system "encompass[ed] the entire accident site" and was "maintained by the

State for draining water from the surface of the road." Pet. Brf. at 6. Instead, they challenged only the relevance of that evidence. They neither presented conflicting causal evidence nor sought additional discovery under Rule 56(f). The dispositive fact here is that the storm system, consisting of a series of drainage boxes connected to a single underground pipe, was undisputedly constructed and maintained to drain storm water from the entire section of road where the accident occurred.

Furthermore, granting immunity in this case would not, as the Barenbrugges suggest, allow the State to escape liability in all water-related roadway accidents. The State has never argued that it is entitled to immunity merely because a storm system *could have been* installed that would have prevented the accident. Instead, it has always asserted that its immunity is based on the presence of an actual storm system and that system's causal connection to the accident. Only in cases such as this one, where a storm system is causally related to the accident, will immunity apply.

The legislature's waiver of immunity for negligence and unsafe roads is not absolute. That waiver is significantly limited by the broad flood and storm systems exception: "Immunity is *not waived* under subsections (3) [waiving immunity for unsafe roads] and (4) [waiving immunity for negligence] if the injury arises out of, in connection with, or results from . . . the construction,

repair, or operation of flood or storm systems." Utah Code Ann. § 63-30d-301(5)(n) (West 2004) (emphasis added). This broad limitation on the waiver of immunity applies to all flood and storm systems, not just to systems unassociated with a road or those that are adequate to handle the deluge that occurred here. The Barenbrugges' request for this Court to narrowly construe the flood and storm system provision is unsupported by case law and by the broad language of the immunity act. Although the Barenbrugges correctly note that the discretionary function exception has been narrowly construed, it does not follow that all of the exceptions in Utah Code Ann. § 63-30d-301(5) should be so construed. The discretionary function exception has been narrowly construed because nearly all acts of government involve at least some amount of discretion. A broad construction would allow the exception to swallow the rule. See Johnson v. Utah Dep't of Transp., 2006 UT 15, ¶ 19, 133 P.3d 402. But the flood and storm systems provision has never been narrowly construed, nor do nearly all acts of government involve storm systems. Moreover, as a general principle, the Utah Supreme Court has required that the immunity act "be strictly applied" because it is through the immunity act that the "legislature has recognized the necessity of immunity as essential to the protection of the state in rendering the many and ever increasing number

of government services." Hall v. Dep't of Corrs., 2001 UT 34, ¶ 14, 24 P.3d 958.

Without citing ambiguity in the statute, the Barenbrugges ask this Court to further limit the plain language of the flood and storm systems provision to unusual and catastrophic natural disasters only. But because there is no ambiguity in the flood and storm systems provision, this Court is precluded from examining any of the legislative history discussed by the Barenbrugges. Wagner v. State, 2005 UT 54, ¶ 10, 122 P.3d 599 (barring ambiguity in a statute, Utah's appellate courts do not look beyond the plain language of the statute). In any event, this Court has applied the identical flood and storm systems language to a simple rainstorm that overwhelmed a city's roadside drainage system. See Cook, 2005 UT App 40 at ¶ 8. This application is consistent with the current version of the immunity act, which contains a separate provision retaining immunity for natural disasters, suggesting that the flood and storm systems provision is not limited to only catastrophic storms. See Utah Code Ann. § 63-30d-301(5)(m) (retaining immunity for "the management of flood waters, earthquakes, or natural disasters").

Conclusion

The State is immune from the Barenbrugges' claim because the immunity act plainly and unambiguously retains immunity for this accident. There is *some* causal connection between the accident and the storm system because both are causally related to the road's water drainage. Accordingly, the broad language of the flood and storm systems exception applies and the State is entitled to immunity.

Dated this 5th day of April, 2007.

J. CLIFFORD PETERSEN
Assistant Attorney General
Attorney for Defendants/Petitioners

Certificate of Service

This is to certify that I mailed TWO copies of the foregoing REPLY BRIEF OF DEFENDANTS/PETITIONERS to the following this 5th day of April, 2007:

ANDERSON & KARRENBERG
Nathan B. Wilcox
Stephen P. Horvat
50 West Broadway
700 Chase Tower
Salt Lake City, Utah 84101
Attorneys for Plaintiffs/Respondents