10-25-2012

Grabicki v. City of Lewiston Appellant's Brief Dckt. 40057

IN THE SUPREME COURT OF THE STATE OF IDAHO

C. BARRY ZIMMERMAN, United States Bankruptcy Trustee, for and on behalf of THOMPSON'S AUTO SALES, INC., an Idaho corporation, Plaintiff/Appellant, vs. CITY OF LEWISTON, a political subdivision in the State of Idaho, Defendant/Respondent.	)	SUPREME COURT DOCKET NO. 40057

APPELLANTS' BRIEF

Appeal from the District Court of the Second Judicial District
for Nez Perce County

Honorable Carl B. Kerrick, District Judge Presiding

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PRELIMINARY STATEMENT

On or around May 2003, an assistant city engineer for the City of Lewiston decided that a "valley" gutter running across the street up-gradient to Tim and Janet Thompsons' property should be replaced with an underground "bubble-up" system. No documentation from that time period has been found showing why or how this decision was made. The assistant city engineer would later assert that the decision was based on his personal observations; he admitted that he had no documentation supporting his decision, he did not conduct an evaluation and assessment regarding the consequences of his decision, and he did not investigate why the existing infrastructure gutter system was selected.

After the assistant city engineer decided to have the bubble-up system installed, he drafted a plan for its installation. The plan was not prepared in substantial conformance with engineering or design standards in effect at the time, and was not approved in advance by the City Council or another entity with authority to give such approval. Had the assistant city engineer attempted to design a gutter that conformed with existing engineering or design standards, he would have discovered that the proposed design would result in water being channeled away from the downhill gutter system and toward the Thompsons' property. The Thompsons were injured as a result of the assistant city engineer's failure to act with due care. They sued under the Idaho Tort Claims Act.

The City moved for summary judgment arguing it was immune from liability for its negligence. The oddity of this case is that it comes before the Court as an appeal from a summary judgment disposition on grounds of discretionary immunity, not design immunity. The district court rejected the City's claim of design immunity, but granted judgment on discretionary

immunity. By so doing, the district court ruled, in effect, that a municipal government's lower-level employee can exercise discretion to not follow existing engineering or design standards and that the City is immune from suit for injuries caused by that decision.

The district court's finding of discretionary immunity on a summary judgment standard conflicts with the language and the purpose of the Idaho Tort Claims Act and the precedent of this Court. Plaintiffs ask the Court to reverse the district court's grant of summary judgment.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

Thompson's Auto Sales, Inc. v. City of Lewiston comes before this Court on appeal from a grant of summary judgment in favor of the City. In its motion for summary judgment, the City argued that it was immune from liability for any injuries the Plaintiffs suffered as a result of the City's negligence under the exception for discretionary immunity, Idaho Code § 6-904(1), and the exception for design immunity, Idaho Code § 6-904(7). The district court rejected the City's design immunity argument but granted judgment on discretionary immunity grounds. Plaintiffs appeal.

B. COURSE OF PROCEEDINGS

Tim and Janet Thompson ("Thompsons") owned real property located at 306 21st Street in Lewiston, Idaho. During all times relevant to this case, the Thompsons operated Thompson's Auto Sales, Inc. ("Thompson's Auto"), which bought and sold used cars and boats. On January 29, 2007, the Thompsons and Thompson's Auto sued the City, claiming that the property had been flooded by stormwater as a result of the City's negligent replacement of an above ground "valley" gutter with an underground "bubble-up" gutter system on a street adjacent to the

property. The City filed a Motion for Summary Judgment on December 26, 2007, claiming that it was immune from suit for the injuries suffered as a result of its negligence under Idaho Code § 6-904(1) (discretionary immunity) and § 6-904(7) (design immunity). On March 20, 2008, District Judge Carl B. Kerrick issued a memorandum opinion and order granting the City's motion for summary judgment on grounds of discretionary immunity.

The record in this case contains two atypical procedural occurrences. First, both the Thompsons and Thompson's Auto filed for bankruptcy during the pendency of this case and, as a result, the applicable U.S. Trustee was substituted for each Plaintiff. Second, neither Plaintiffs nor Plaintiffs' counsel were provided with a copy of the district court's February 29, 2012 Judgment or notice that such judgment had been entered until after the time for filing an appeal had run. As a result, the district court issued an order granting relief from judgment pursuant to Idaho Rule of Civil Procedure 60(b), setting the effective date of judgment as July 5, 2012. Plaintiffs timely filed a Notice of Appeal on June 18, 2012 and an Amended Notice of Appeal on July 30, 2012.

C. STATEMENT OF FACTS

On May 19, 2006, the Lewiston area experienced heavy rainfall.[1] Lewiston's main commercial strip—21st Street—is not without stormwater management infrastructure. As the rains fell, stormwater was channeled from 21st Street and the adjoining properties into the gutters of 21st Street. The stormwater accumulated volume and speed as it flowed downhill toward the base of the 21st Street grade.[2] The City's stormwater infrastructure was designed,

[1] R. Vol. I, pp. 103-04.
[2] *Id.*

and has historically succeeded, in directing the stormwater all the way down the 21st Street grade to an area of City property where it can dissipate or be removed without causing damage. On this day, it failed. As the waters reached the road just up-gradient to the Thompsons' property, it swept out onto the up-gradient road and into the Thompson's Auto show lot, damaging or destroying much of what was in its path.[3] In the following years, this happened again (November 7, 2006), and again (June 7, 2010), and again (June 9, 2010).[4] As described in detail below, the change that caused this failure in the City's stormwater management system was the decision by an assistant city engineer to replace a gutter that was designed in conformity with existing engineering standards, with a gutter that was not.[5]

The entire length of 21st Street is situated upon a grade, running from a higher elevation on the south end to a lower elevation on the north end. The Thompsons' property is located near the base at the north end. Idaho Street runs adjacent to the south side of the Thompsons' property (up-gradient to the property) and 21st Street runs adjacent to the east side, so that the intersection of Idaho Street and 21st Street forms the Southeast Corner of the Thompsons' lot. At the point where the water hit Idaho Street, it was flowing down a 7.7% grade.[6]

Prior to installation of the current gutter system, the water had been channeled across Idaho Street by a valley gutter. The City Manager, Janice Vassar, approved installation of the valley gutter system at the recommendation of the City Public Works Director.[7] The Idaho Transportation installed the valley gutter system sometime between September of 1990 and April

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[3] *Id.*
[4] R. Confidential Exhibit, p. 22 (Exhibit 4, p. 2 of Second Aff. of Chris H. Hansen).
[5] R. Vol. I, pp. 104-05.
[6] R. Vol. I, p. 103.
[7] R. Vol. I, p. 169.

of 1994.[8] That installation remained in place as a part of the City's stormwater management system until 2003.[9] In May 2003, an assistant city engineer, John Watson, prepared plans for the City's "2003 Street Maintenance Project."[10] Mr. Watson decided to remove the valley gutter and replace it with a catch basin and underground pipe (sometimes referred to as a "bubble-up system").[11] According to Mr. Watson, he took this action in response to complaints he had received about the adverse effect the valley gutter had on vehicle traffic.[12] Mr. Watson did not recall the nature of those complaints or who made the complaints.[13] He also stated that he (1) did not perform any study regarding the effect of the valley gutter on traffic, (2) did not document any adverse effects of the valley gutter, (3) had no knowledge regarding who designed the valley gutter, (4) did not look at the valley gutter plans and specifications, and (5) did not talk to anyone in the engineering staff regarding the history of the valley gutter.[14]

Not only could Mr. Watson not support his decision to replace the valley gutter, his plans for the bubble-up system did not conform with existing design or engineering standards. "[T]he plans did not specify any sizes, limits, requirements, or other specifications that would normally be included on such design plans. Moreover, there was no apparent evaluation or appreciation of the specifications that would be required to adequately serve the storm water drainage system at the location up-gradient from [the Thompsons'] property."[15] While the City Council approved

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[8] *See* R. Vol. I, p. 109.
[9] *Id.*
[10] R. Vol. I, p. 33, ¶3.
[11] R. Vol. I, p. 104.
[12] R. Vol. I, p. 165.
[13] *Id.*
[14] R. Vol. I, p. 166.
[15] R. Vol. I, p. 108. *Cf.* R. Vol. I, p. 108 *with* R. Vol. I, pp. 37-47.

the bid documents and awarded the job to the recommended bid, it did not review or approve the plans to remove the Idaho Street valley gutter.[16]

The effect of Mr. Watson's design was that during significant storms most of the volume of water passed over the top of a metal grate that formed the inlet of the bubble-up system.[17] The water, having passed over the top of the inlet, continued its flow to the northwest down an 18% grade, where it crossed Idaho Street and entered the Thompsons' property.[18] On May 19, 2006, stormwater swept onto Thompson's Auto's car lot, breached and undercut a concrete retaining wall on the north side of the Thompsons' property and washed out a substantial portion of the car lot.[19] The Plaintiffs' expert, Roger Tutty, determined that the concrete valley gutter would have effectively channeled the storm water north across Idaho Street, directing it to the existing stormwater infrastructure on the other side of the street.[20] The bubble-up system evidenced its inadequacy on that day and has continued to cause damage to the Plaintiffs since that time.[21]

ISSUES PRESENTED ON APPEAL

In 2003, an assistant engineer for the City decided to replace the existing valley gutter system with a bubble-up system. The bubble-up system (1) was not designed in conformity with existing design or engineering standards; and (2) was not directed, reviewed, or approved by the City Council. The City asks this Court to assume negligence causing damage to the Plaintiffs, but to declare the City immune from suit for the injuries on the grounds of discretionary

[16] R. Vol. I, p. 140.
[17] R. Vol. I, p. 103.
[18] *Id.*
[19] R. Vol. I, p. 104.
[20] R. Vol. I, pp. 104-05.
[21] R. Confidential Exhibit, p. 22 (Exhibit 4, p. 2 of Second Aff. of Chris H. Hansen).

immunity. The affidavit of the assistant engineer states that the construction was pursuant to his plan, and that he individually considered the policies behind replacing the system. Has the City established its entitlement to discretionary immunity on a summary judgment standard?

ARGUMENT

A. STANDARD OF REVIEW

The district court granted summary judgment in favor of the City on the grounds that the City was immune from liability for its negligent actions under the discretionary immunity exception, as set forth in Idaho Code § 6-904(1). "When reviewing a motion for summary judgment, this Court uses the same standard employed by the trial court when deciding such a motion." *Rees v. State, Dep't of Health & Welfare*, 143 Idaho 10, 14, 137 P.3d 397, 401 (2006). Summary judgment is only appropriate when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Idaho R. Civ. P. 56(c). In its review of this appeal, the Court liberally construes all facts in favor of the Plaintiffs. *See Coonse ex rel. Coonse v. Boise Sch. Dist.*, 132 Idaho 803, 805, 979 P.2d 1161, 1163 (1999). "If reasonable persons could reach different findings or draw conflicting inferences from the evidence, the motion should be denied" and the Plaintiffs should be afforded their day in court. *See Rausch v. Pocatello Lumber Co., Inc.,* 135 Idaho 80, 83, 14 P.3d 1074, 1077 (Ct. App. 2000).

B. ANALYSIS UNDER THE IDAHO TORT CLAIMS ACT

This Court has set forth a two-part analysis when ruling on a motion for summary judgment based on an immunity defense under the Idaho Tort Claims Act ("ITCA"). *See*

Czaplicki v. Gooding Joint Sch. Dist. No. 231, 116 Idaho 326, 330, 775 P.2d 640, 644 (1989). The Court must "first determine whether the plaintiffs' allegations and supporting record generally state a cause of action for which 'a private person or entity would be liable for money damages under the laws of the state of Idaho.'" *Id.* (quoting *Walker v. Shoshone County,* 112 Idaho 991, 995, 739 P.2d 290, 294 (1987)). Next, the Court must "determine whether an exception to liability under the ITCA shields the alleged misconduct from liability." *Id.*

"[T]he existence of the common law tort of negligence answers the threshold inquiry in the affirmative." *Id.* The current waiver of liability provision is now found in Idaho Code § 6-903(1):[22]

> Except as otherwise provided in this act, every governmental entity is subject to liability for money damages arising out of its negligent or otherwise wrongful acts or omissions and those of its employees acting within the course and scope of their employment or duties, whether arising out of a governmental or proprietary function, where the governmental entity if a private person or entity would be liable for money damages under the laws of the state of Idaho . . . .

To recover under common law negligence, there must be a duty, requiring the defendant conform to a certain standard of conduct. *See Brian & Christie, Inc. v. Leishman Elec., Inc.*, 150 Idaho 22, 29, 244 P.3d 166, 173 (2010). Every person has a general duty to use due or ordinary care not to injure others when undertaking to act. *See Whitt v. Jarnagin,* 91 Idaho 181, 188, 418 P.2d 278, 285 (1966). Plaintiffs have alleged that the City, through the actions of an assistant engineer, affirmatively acted by replacing the valley gutter crossing Idaho Street with a bubble-up system. Plaintiffs have further alleged that the City was negligent in the design and operation

[22] The corresponding provision within the Federal Tort Claims Act is 28 U.S.C. § 2674: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

of the bubble-up system and that its negligence was the proximate cause of the Plaintiffs' damages. Therefore, for purposes of this appeal, the Court must assume the negligence of the City and need only determine whether the City is shielded from liability by the ITCA. *See City of Lewiston v. Lindsey*, 123 Idaho 851, 855, 853 P.2d 596, 600 (Ct. App. 1993).

In addition to the duty to exercise due care when undertaking to act, Idaho law has long required that a city maintain its streets, sidewalks. *See, e.g., Carson v. City of Genesee*, 9 Idaho 244, 255, 74 P. 862, 865 (1903).[23] A city holds the power to install, repair, and maintain gutters along its streets and sidewalks. *See* Idaho Code §§ 50-314, 50-315 & 50-1703. More than merely holding the power to maintain its gutters, "[a] city has exclusive control by virtue of its police power over its streets, highways and sidewalks within the municipal boundaries." *Kleiber v. City of Idaho Falls*, 110 Idaho 501, 503, 716 P.2d 1273, 1275 (1986). "[S]uch corporations should be held liable for a negligent discharge of that duty. The application of this principle

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[23] *See Smith v. State*, 93 Idaho 795, 805, 473 P.2d 937, 947 (1970). The Court issued *Smith v. State* prior to enactment of the ITCA. *Smith* struck down the judicial doctrine of sovereign immunity, holding "that the doctrine of sovereign immunity is no longer a valid defense in actions based upon tortious acts of the state or any of its departments, political subdivisions, counties, or cities, where the governmental unit has acted in a propriety as distinguished from a governmental capacity." *Id.* at 802, 472 P.3d at 944. The ITCA significantly broadened government liability beyond the holding of *Smith*, waiving immunity even on acts in its governmental capacity and reserving immunity for governmental entities to only an express list of exceptions. *See* Idaho Code §§ 6-901 through -904 (1971); *see also Chandler Supply Co., Inc. v. City of Boise*, 104 Idaho 480, 484, 660 P.2d 1323, 1327 (1983) *overruled on other grounds by Sterling v. Bloom*, 111 Idaho 211, 723 P.2d 755 (1986).

Of note here, the City would still be liable for its negligence even if *Smith* and the ITCA had not broadened liability for governmental entities. Both the majority and the dissent in *Smith* agree that the doctrine of sovereign immunity historically had not protected cities from suits based on failure to maintain their streets and sidewalks. *Id.* at 805, 473 P.2d at 947 (maj.) and *id.* at 811, 472 P.2d at 953 (McFadden, C.J., dissenting) (citing *Eaton v. City of Weiser*, 12 Idaho 544, 86 P. 541 (1906); *Moreton v. Village of St. Anthony*, 9 Idaho 532, 75 P. 262 (1904); *Carson v. City of Genesee*, 9 Idaho 244, 74 P. 862 (1903)).

should prove a spur to the officials of such corporations to keep the streets and sidewalks in a safe condition for the uses to which they are dedicated. Its denial would be to defeat the plainest justice in many instances." *Carson*, 9 Idaho at 255, 74 P. at 865.

"The next stage in the analytical process applicable to such a motion requires evaluation of the availability of an exception to liability under the ITCA." *Czaplicki*, 116 Idaho at 330, 775 P.2d at 644. The City raised sections 6-904(1) and 6-904(7) as grounds for immunity. Section 6-904(1) is commonly referred to as the "discretionary immunity exception" and section 6-904(7) is commonly referred to as the "design immunity exception." The relevant language in Idaho Code § 6-904 reads:

> A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which:
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> 1. Arises out of any act or omission of an employee of the governmental entity exercising ordinary care, in reliance upon or the execution or performance of a statutory or regulatory function, whether or not the statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused.
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> 7. Arises out of a plan or design for construction or improvement to the highways, roads, streets, bridges, or other public property where such plan or design is prepared in substantial conformance with engineering or design standards in effect at the time of preparation of the plan or design or approved in advance of the construction by the legislative body of the governmental entity or by some other body or administrative agency, exercising discretion by authority to give such approval.

The burden of establishing immunity under Idaho Code § 6-904 rests upon the governmental entity. *See, e.g., Intermountain Const., Inc. v. City of Ammon*, 122 Idaho 931, 933, 841 P.2d

1082, 1084 (1992); *United States v. Nez Perce County, Idaho*, 553 F. Supp. 187, 191 (D. Idaho 1982). Idaho courts have relied upon juries to determine whether the facts of a dispute establish a municipality's entitlement to immunity. *See, e.g., Lawton v. City of Pocatello*, 126 Idaho 454, 460-61, 886 P.2d 330, 336-37 (1994); *Morgan v. State*, 124 Idaho 658, 663-64, 862 P.2d 1080, 1085-86 (1993); *Leliefeld v. Johnson*, 104 Idaho 357, 361, 659 P.2d 111, 115 (1983). By granting summary judgment on discretionary immunity grounds, the district court denied Plaintiffs the opportunity to present evidence and argument to the jury that the City had not carried its burden.

This Court has set forth general principles that apply to every analysis of the ITCA. First, municipalities are liable for their negligent acts as a general rule. *See Jones v. City of St. Maries*, 111 Idaho 733, 734, 727 P.2d 1161, 1162 (1986). Second, "[t]he Act is to be *liberally construed* with a view toward accomplishing its aims and purposes and attaining substantial justice." *Czaplicki*, 116 Idaho at 331, 775 P.2d at 645 (emphasis in original). Third, exceptions to the general rule of liability, including those contained within Idaho Code § 6-904, "must be closely construed." *See Id.* (quoting *Sterling v. Bloom*, 111 Idaho 211, 215, 723 P.2d 755, 759 (1986)).

C. THE CITY DID NOT CARRY ITS BURDEN OF ESTABLISHING ENTITLEMENT TO IMMUNITY WHEN IT CONCEDED NEGLIGENCE AND DID NOT CHALLENGE ALLEGATIONS OF IMPROPER DESIGN, RELYING SOLELY UPON THE AFFIDAVIT OF AN ASSISTANT CITY ENGINEER STATING THAT HE INDIVIDUALLY CONSIDERED POLICIES FOR HIS ACTIONS.

Plaintiffs seek compensation for damages suffered as a result of the City's replacement of a gutter system that conformed with existing engineering or design standards (and worked) with a system that failed to conform with existing engineering or design standards (and does not

work). In its analysis of the City's motion for summary judgment, the district court was required to assume the negligence of the City's action. In addition, the district court's reasoning on discretionary immunity should be read in the light of its ruling that the City was not entitled to design immunity. The district court effectively ruled that a municipality is immune from liability for an employee's negligent conduct, even though the employee does not adhere to the proper design standards, so long as the negligent employee affies that he or she considered policies before engaging in the challenged conduct. This ruling allows the exception of discretionary immunity to swallow the liberal rule of liability. It also fails to interpret the discretionary immunity exception within the context of the ITCA and the accompanying exceptions found in section 6-904; it robs the design immunity exception of its plain application—rendering it surplusage. Interpretation in the light of past and current guidance from case law and in the context of the ITCA compels a holding that the City failed to carry its burden of establishing immunity under the discretionary immunity exception.

1. The discretionary immunity exception does not immunize a municipality from damage caused by a negligent design, where the municipality is not otherwise entitled to immunity under the design immunity exception.

A plan or design by a governmental entity is not immune from liability under the discretionary immunity exception; the design immunity exception controls. *Bingham v. Franklin County*, 118 Idaho 318, 323, 796 P.2d 527, 532 (1990). While the discretionary immunity exception *may* insulate a governmental entity from liability for deciding to make a plan or design, once that entity drafts the plan or design, "it must comply with the two requirements of [the design immunity exception] to be immune from any suit arising out of that plan or design." *Bingham v. Idaho Dep't of Transp.*, 117 Idaho 147, 149-50, 786 P.2d 538, 540-41 (1989).

Therefore, the question is not whether the City's assistant engineer exercised discretion, but "whether that plan substantially conformed to existing design standards or whether it received advance approval." *Lawton*, 126 Idaho at 460, 886 P.2d at 336.

2. The language and history of the ITCA establish that the discretionary immunity exception is inapplicable to the City's conduct.

The context in which the ITCA was adopted, its legislative history, and its language all support the conclusion that only the design immunity exception, not discretionary immunity exception, applies to cases such as this one. "In construing a statute, this Court attempts to discern and implement the intent of the legislature." *Leliefeld*, 104 Idaho at 367, 659 P.2d at 121. In addition to the plain language of the statute, the Court looks to the statute's purpose and structure, its legislative history, its evolution, and the interpretation of other sovereigns with similar laws and issues. *See id.* A proper analysis of the ITCA must consider *Smith v. State*, 93 Idaho 795, 473 P.2d 937 (1970).[24]

Smith v. State is the seminal case on the pre-ITCA history of sovereign immunity in Idaho. The opinion also unmasks many of the misconceptions regarding pre-ITCA sovereign immunity.[25] While the ITCA is often credited with eliminating sovereign immunity in the State

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[24] *See supra* note 23.

[25] In the *Smith* opinion, this Court observed that while the majority of states in the United States had adopted the rule of law that "the king can do no wrong," those jurisdictions overlooked the ancient doctrines of equity that accompanied this rule. *Id.* at 799-800, 472 P.2d at 941-42. While the king could not be compelled into a court of law to account for injuries caused by his negligence, "it was acknowledged that the king as the fountain of justice and equity, could not refuse to redress wrongs when petitioned to do so by his subjects." *Id.* at 799, 472 P.2d at 941. "[H]e was morally bound to do the same justice to his subjects as they could be compelled to do to one another." *Id.* Thus, the *Smith* Court observed, the American rule of "absolute sovereign immunity" was one of dubious development. *See id.* at 799-800, 472 P.2d at 941-42.

of Idaho, the true sea change occurred with this Court's issuance of the *Smith* opinion, nearly eight months prior to the signing of the ITCA. In *Smith*, the Court struck down the judicial doctrine of sovereign immunity, stating that the idea that a judicial doctrine would grant the sovereign absolute immunity where breach, cause, and injury were clear, offended the Court's sense of justice. *Id.* at 800, 472 P.3d at 942. Absent legislation, this was to be the new law of the land; the *Smith* Court gave the Governor and the Forty-First Idaho State Legislature the First Regular Session to enact such legislation. *Id.* at 808, 472 P.3d at 950. The legislature and Governor accepted the *Smith* Court's invitation by enacting the Idaho Tort Claims Act, Idaho Code §§ 6-901 through -928 (1971).[26]

The history of the ITCA, as understood in light of the *Smith* opinion, evidences that its enactment was not the result of a rushed or indeliberate act.[27] All three branches of government

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Not only was absolute sovereign immunity never truly the proper standard, it was particularly unfitting in 1970, where "the influence of both state and federal government permeates every aspect of American life." *Id.* at 801, 472 P.3d at 943. The *Smith* Court further supported its holding by pointing out that "[t]he 'rule of sovereign immunity' ha[d] not existed in Idaho in as wide a scope and with the force that its repetition would imply." *Id.* at 805, 472 P.2d at 947. "From its inception there has been constant judicial restriction of the [sovereign immunity] rule." *Id.*

[26] In adopting the ITCA, the legislature may have rendered the rule of *Smith* "academic" but it did not moot the guidance provided by *Smith*'s reasoning. *See Chandler Supply Co., Inc. v. City of Boise*, 104 Idaho 480, 491, 660 P.2d 1323, 1334 (1983) (Bistline, J. dissenting) *overruled by Sterling v. Bloom*, 111 Idaho 211, 723 P.2d 755 (1986). The *Smith* Court's reasoning was an acknowledgement of its equitable role as this State's highest court. The Court recognized that the petitioner's injuries were no less damage-producing simply because the harm was caused by the sovereign. *See Smith*, 93 Idaho at 801, 472 P.2d at 943.

[27] The *Smith* opinion recounts the legislative consideration of the sovereign immunity issue. 93 Idaho at 801-02, 472 P.2d at 943-44. The Idaho legislature debated passing a tort claims act in both 1969 and 1970.

> In the first session of the Fortieth Idaho Legislature [1969], legislation dealing with the subject of sovereign immunity was seriously urged and was passed by

participated in providing the relief to which its citizens were entitled. The intent was to provide broad liability to government entities for negligent conduct causing injury. Immunity was to be limited to express and closely construed exceptions. *Czaplicki*, 116 Idaho at 331, 775 P.2d at 645. This Court has reasoned in *Bingham v. Franklin County* and *Bingham v. Idaho Dep't of Transportation*, that the inclusion of a discretionary immunity exception *and* design immunity

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> both houses. The executive branch while vetoing the proposed statute recognized the need for affording relief to persons suffering injury because of the tortious acts of the state.

Id. (footnotes omitted). In defense of his decision to veto the bill, Governor Donald Samuelson presented the message to the Speaker of the House, that included the following:

> I believe that the state and its political subdivisions should be responsible citizens; responsible in the sense that lawful claims for injury to persons or property should receive realistic compensation from these entities of government. If the state is to expect good citizenship, it should be a good citizen. However, at this time, the state and its political subdivisions are not properly prepared with sufficient funding, insurance coverage, and legal counsel to bear what could be extremely heavy burdens imposed by this bill.
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> Further need to review this legislation is raised by the Attorney General. Serious questions are present as to whether or not the exemptions from liability are sufficient and clearly stated.

Governor Donald Samuelson's Message to the Speaker of the House, April 4, 1969 re: Veto of House Bill 198. The nature of Governor Samuelson's concerns regarding the scope and clarity of the exceptions to liability is not set forth in the legislative history. Whether the ITCA that was eventually enacted satisfied his concerns is unknown, as Governor Samuelson was defeated in the 1970 election by Governor Cecil Andrus.

> In the second session of the Fortieth Legislature, in 1970, a more comprehensive tort claims act (H.B. No. 591) was introduced early in the session in the House and passed by a large majority. However the Senate did not act on this legislation and it died in committee. This indicates the continuing awareness of the Legislature for the necessity of limiting or abolishing sovereign immunity in various areas including the field of torts.

Smith, 93 Idaho at 801-02, 472 P.2d at 943-44.

exception evidences the legislature's intent that those exceptions have distinct roles in a court's immunity analysis; a holding particularly supported by the ITCA's legislative history.[28]

In addition to legislative history, the Court's precedent holding the discretionary immunity exception inapplicable to situations where design standards are not followed is based upon the canons of statutory interpretation and the dictates of reason. When interpreting a statutory provision, the Court must ensure that all provisions of a statute are given effect and no one part is rendered surplusage by the overly broad construction of another. *See Bingham v. Idaho Dep't of Transp.,* 117 Idaho at 149, 786 P.2d at 540; *Sterling v. Bloom,* 111 Idaho 211, 222, 723 P.2d 755, 766 (1986). Applying those canons to this case, the discretionary immunity exception must be read and interpreted in conjunction with the design immunity exception. *Bingham,* 117 Idaho at 149, 786 P.2d at 540; *Sterling,* 111 Idaho at 222, 723 P.2d at 766. By including the design immunity exception, the legislature demonstrated its intent that the discretionary immunity exception was not intended to include decisions involving *any* element of choice, otherwise there would be no need to consider the sufficiency of a plan or drawing and, for that matter, government immunity would return with a strength that did not exist even at the time of *Smith v. State. See Sterling*, 111 Idaho at 227, 723 P.2d at 771.

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[28] The 1969 bill did not include a design immunity exception. The 1970 bill contained such an exception, but the language and format of the bill differs significantly from either the one proposed in 1969 or the one adopted in 1971. The 1971 bill was patterned on the Federal Torts Claims Act (as was the 1969 bill), but now included an express design immunity exception. The legislature's inclusion of the design immunity exception is of note because the Federal Tort Claims Act does not include an express design immunity provision. At the time the legislature passed the ITCA, it likely looked to the tort claims act of California or New York for this provision.

"The decision to comply with engineering standards is not a discretionary act. Engineering standards must be followed to insure the safety of the citizens of this state." *Burgess v. Salmon River Canal Co., Ltd.*, 119 Idaho 299, 308, 805 P.2d 1223, 1232 (1991) (citation omitted). Therefore, in order to establish entitlement to summary judgment on grounds of immunity, the City must establish entitlement under the design immunity exception.

3. The City failed to establish entitlement to summary judgment on grounds of design immunity when (1) it did not challenge that the design was not in conformance with existing engineering or design standards and (2) it did not establish that a plan was approved in advance of construction by a body having authority and exercising discretion to approve the design.

To carry its burden on design immunity, the City must "establish (1) the existence of a plan or design that was (2) *either* prepared in substantial conformance with existing engineering standards *or* approved in advance of construction by the legislative or administrative authority." *Lawton*, 126 Idaho at 459, 886 P.2d at 335 (emphases in original). In the City's memoranda in support of its Motion for Summary Judgment, the City argued that the drawings of assistant engineer Watson constituted a plan sufficient to entitle it to protection under the design immunity exception. *See* R. Vol. I, pp. 81 & 112-15. Thus, the City need only establish that no genuine issue of material fact exists that the City can satisfy the second requirement of the design immunity analysis.

In opposition to the City's claim of design immunity, Plaintiffs submitted the Affidavit of Roger Tutty, *see* R. Vol. I, pp. 102-09. Mr. Tutty is a licensed engineer in the state of Idaho, who was engaged by Plaintiffs to determine whether Watson's design plans were prepared in substantial conformance with existing engineering standards. *Id.* at 108. Plaintiffs provided the district court with Mr. Tutty's professional opinion that the design plans were inadequate. *Id.* In

fact, the plans were so inadequate, that the drawings lack any "certain depths to which the pipes were to be set, nor do the plans indicate a certain size or type of pipe", *id.*; the pipe that would be the very conduit used to transport water.

The City, understandably, did not argue the sufficiency of the design, but rather argued that it had been approved in advance by the City Council. Plaintiffs responded (1) that the record does not establish (at least for purposes of summary judgment) that the City Council reviewed and approved the plans; and (2) even if the City Council had reviewed the "plans" the assistant engineer's drawings were so inadequate that the design immunity exception does not apply to such an approval.

a) The record does not establish that the City reviewed and approved the plans.

The City must establish (1) actual review by the legislative body or some other body or agency; and (2) that the reviewing body had authority to approve a design prior to construction. *See* Idaho Code § 6-904(7); *see also Morgan*, 124 Idaho at 664, 862 P.2d at 1086. In *Morgan*, this Court found the defendant was not entitled to a jury instruction where it offered evidence that review was required and that a high level employee directed the drafting of the contested plan, but failed to offer testimony that the plan was *actually* reviewed. *Id.*

Like *Morgan*, there is simply no evidence that the Lewiston City Council actually approved a plan or design for the 2003 Street Maintenance Project, much less for the specific storm sewer work performed at the intersection of 21st Street and Idaho Street. The City claims that the Council purportedly approved the plan in its June 9, 2003 meeting. To satisfy its summary judgment burden, the City offered the affidavits of John Watson, the assistant city

engineer who drafted the plan, and Kari Kuchmak, the acting city clerk. Ms. Kuchmak attached the agenda for the June 9 meeting, the minutes for the June 9 meeting, and the bid documents prepared by the City's Purchasing Division as exhibits to her affidavit. The agenda for the June 9 meeting shows the planned action:

> H. BID AWARD: 2003 SUMMER STREET MAINTENANCE PROJECT AND COUNTRY CLUB DRIVE WATER MAIN REPLACEMENT: POE ASPHALT, CLARKSTON, WA: $855,557.46.

R. Vol. I, p. 58. The agenda shows that City Council anticipated approving a bid award, not reviewing the plans to which the bids were responding. The minutes for the June 9 meeting show the nature and extent of the City Council's action on this issue.

> H. BID AWARD: ACCEPTING THE BID PROPOSAL OF POE ASPHALT OF CLARKSTON, WASHINGTON, FOR THE 2003 STREET MAINTENANCE AND COUNTRY CLUB DRIVE WATER LINE REPLACEMENT PROJECTS IN THE AMOUNT OF $855,557.46 AND AUTHORIZING THE CITY MANAGER TO EXECUTE A CONTRACT BETWEEN POE ASPHALT AND THE CITY.

R. Vol. I, p. 69. The minutes show that City Council did not approve a plan or design for the construction of the project; it selected a bid proposal for the project based upon the recommendation of its staff. *See* R. Vol. I, pp. 61-62. Nowhere in the agenda, the minutes, or the affidavits does the City provide evidence that the City Council actually reviewed and approved (or even saw) the plans for the replacement of the gutter system. The City has not established entitlement to summary judgment on this point.

b) The design immunity exception should not be extended to immunize municipalities from liability based upon approval of patently inadequate plans.

Even if the City had offered evidence of actual review, the design immunity exception should not be extended to immunize a municipality from injuries caused by a negligent design where such negligence is patently obvious. The "plans" of the assistant city engineer do not include the slope of the grade and the curb measurements at the intake grate, diameter of the pipes, the type of pipes, the depth to which they were buried, and so forth. "The policy behind the [design immunity exception] is clearly to prevent juries from second-guessing the judgment of state planners and engineers who make detailed and careful studies prior to the construction of public roads and bridges." *Leliefeld*, 104 Idaho at 384, 659 P.2d at 138 (Bistline, J. dissenting) (citing *Weiss v. Fote,* 167 N.E.2d 63 (N.Y. 1960)). While there is no culpability for city council members relying upon the expertise of their staff, cities should not enjoy immunity from damage caused by plans having a manifest lack of detailed and careful study.

4. Even if design immunity did not apply, the discretionary immunity exception does not immunize a municipality from liability for injury caused by the negligence of an assistant city engineer who individually considers policies.

The district court's reasoning would immunize a municipality from liability for all negligent acts of its employees, so long as those acts were done within the context of a larger non-routine city project and the employee testifies he or she individually considered policy factors. Although the design immunity exception analysis provided above is dispositive to this

appeal,[29] the discretionary immunity exception would still not apply, even in the absence of a plan or design.

"There is a two-step process for determining the applicability of the discretionary immunity exception." *Dorea Enterprises, Inc. v. City of Blackfoot*, 144 Idaho 422, 425, 163 P.3d 211, 214 (2007). "The first step is to examine the nature and quality of the challenged actions." *Id.* "The second step is to examine the underlying policies of the discretionary function, which are: to permit those who govern to do so without being unduly inhibited by the threat of liability for tortious conduct, and also, to limit judicial re-examination of basic policy decisions properly entrusted to other branches of government." *Id.* The district court expanded the discretionary immunity exception to an unwarranted breadth by (1) equating any act requiring a substantial amount of thought and discretion as entitled to immunity; and (2) failing to recognize the actual decision-making process that took place here.

In order to engage in the first step of the analysis, the Court must identify the challenged action. Plaintiffs challenge the replacement of a working gutter system with a non-working system. In other words, Plaintiffs challenge the replacement of a gutter system that was designed and constructed in conformance with existing engineering standards with one that was not

[29] The City argued that the drawings found in the record at pages 43 and 45 constitute a plan or design under the ITCA for replacement of the gutter system. *See* R. Vol. I, pp. 81 & 112-15. As a result of this position, the only exception from liability available to the City was design immunity. The discretionary immunity exception simply could not apply. *See Bingham v. Franklin County*, 118 Idaho at 323, 796 P.2d at 532; *Bingham v. Idaho Dep't of Transp.*, 117 Idaho at 149-50, 786 P.2d at 540-41. However, even if the City were not judicially estopped from now arguing that those were not a "plan or design," *see Indian Springs LLC v. Indian Springs Land Inv., LLC*, 147 Idaho 737, 748, 215 P.3d 457, 468 (2009), this matter still should be submitted to the jury so that the jury might determine whether a plan or design existed and, if it found no plan or design existed, then determine whether the City is entitled to immunity under the discretionary immunity exception. *See Lawton*, 126 Idaho at 460, 886 P.2d at 336.

designed in conformance with existing engineering standards. Identification of the challenged action illustrates the suitability of application of the design immunity exception and the unsuitability of application of the discretionary immunity exception to this case.

Not all actions requiring discretion are entitled to discretionary immunity. "[V]irtually all human endeavors, even the driving of a nail, involve *some* type of discretion as commonly defined. Clearly, then, 'discretionary function' does not include functions which involve *any* element of choice, judgment or ability to make responsible decisions; otherwise every function would fall within the exception." *Sterling*, 111 Idaho at 227, 723 P.2d at 771 (citing *Johnson v. State*, 447 P.2d 352, 357 (Cal. 1968) (emphasis in original)); *see also Czaplicki*, 116 Idaho at 330-31, 775 P.2d at 644-45. "The acts or omissions for which the government is liable necessarily will include a substantial amount of thoughtful determinations and elections among available alternatives." *Roberts v. Trans. Dep't*, 121 Idaho 727, 733, 827 P.2d 1178, 1184 (1991). Discretionary immunity is reserved for "[d]ecisions involving a consideration of the financial, political, economic and social effects of a policy or plan." *Dorea,* 144 Idaho at 425, 163 P.3d at 214; *see also Sterling*, 111 Idaho at 227, 231, 723 P.2d at 771, 775 (looking to formulation of policy and broad impact). "To establish discretionary function immunity, the [municipality] must show the [challenged conduct] was a discretionary decision in the sense used by I.C. § 6–904(1)." *Bingham v. Franklin County*, 118 Idaho at 323, 796 P.2d at 532.

To make the requisite showing, the City must establish that no genuine issue of material fact exists that the challenged decision was not one of "practicality" but rather required "an evaluation of financial, political, economic and social effects." *Ransom v. City of Garden City*, 113 Idaho 202, 205, 743 P.2d 70, 73 (1987). The City argued before the district court that the

decision to replace the gutter system was made by the City Council. R. Vol. I, p. 119. As the district court found, the record simply does not support that argument. R. Vol. I, p. 140. Nevertheless, the court granted summary judgment on the grounds that the assistant city engineer had considered policies such that his decision was entitled to discretionary immunity. R. Vol. I, p. 137. The discretionary immunity exception does not immunize—and should not be extended to immunize—municipalities from liability arising out of the negligent decision of a low-ranking employee who supports his decision by later stating that he individually considered policies without the aid of any appreciable evaluation.

This Court has declined to hold, as a bright line rule, that the decisions of low-ranking employees are never entitled to discretionary immunity. *Ransom*, 113 Idaho at 204, 743 P.2d at 72. However, the Court has recognized that "greater rank or authority will most likely coincide with greater responsibility for planning or policy formation decisions." *Id.* Thus, while the test remains the nature of the decision, the lower the rank of the employee the greater the likelihood that the challenged decision is not entitled to discretionary immunity. *See id.* In order to find entitlement to discretionary immunity for the decision of a city employee, this Court has looked to the authority of the employee and the nature of his or her decision. *See Dorea*, 144 Idaho at 426, 163 P.3d at 215.

In *Dorea*, the plaintiff challenged the decision of Jeff Guthrie, department supervisor of the City of Blackfoot's sewage treatment plant, to flush the sewer lines on an annual basis. *Id.* at 424, 163 P.3d at 213. Plaintiff claimed the decision to flush the sewer lines only once a year was negligent because the city knew it had a problem with blocked sewer lines. *Id.* In its analysis of the supervisor's decision, this Court noted Guthrie's position as department head before

proceeding to the nature of Guthrie's analysis. *Id.* at 426, 163 P.3d at 215. The *Dorea* Court was presented with facts where it was uncontroverted that Guthrie took into account the "City's resources, in both manpower and machinery and whether the policy was best suited to serve the public interest. Specifically, Guthrie considered 'money, budgets, the amount of people that [they] had, [specifically,] the amount of educated people.'" *Id. Cf. Jones v. City of St. Maries*, 111 Idaho 733, 736-737, 727 P.2d 1161, 1164-1165 (1986), (remanding a finding discretionary immunity because the evidence did not indicate "that the city, due to budgetary constraints or other factors, made a policy decision not to inspect its water mains and fire hydrants . . . ."). Unlike the defendant in *Dorea*, the City has not set forth any budgetary constraints or personnel constraints that would explain why it installed an ineffective gutter grate and curb inlet.

The City also failed to establish that Watson had authority to make the "discretionary" decision challenged here. Conversely, Plaintiffs offered evidence that Watson's authority could not be assumed in this case, despite it being the City's burden to establish authority. Plaintiffs offered the affidavit of Janice Vassar, the City Manager from 1992 until 2006. In Ms. Vassar's affidavit, she affied that: (1) she approved installation of the valley gutter; (2) she does not recall being consulted about its removal; and (3) during her tenure neither the City Engineering Department nor the Public Works Director had authority to engage in a substantial redesign of infrastructure without approval. City Manager. R. Vol. II, pp. 251-53. The City did not offer any credible evidence of authority by the relevant actors to replace the valley gutter before the filing of Ms. Vassar's affidavit, and has not offered any credible evidence since its filing. The district court provided no explanation supporting its finding that Watson had such authority.

Further, the City failed to establish that Mr. Watson adequately collected and analyzed any real evidence of a problem. The most detailed explanation of the decision-making process regarding replacement of the gutter system is found in the deposition of Mr. Watson. R. Vol. I, pp. 164-67. Mr. Watson stated that someone (he did not remember who) directed him to replace the gutter system, because that person thought the valley gutter posed a safety problem (he did not recall the nature of the safety concern). R. Vol. I, p. 165. Mr. Watson also stated that he made an evaluation of the safety features of the valley gutter system versus the bubble-up system, consisting of (a) observing some skids on the asphalt next to the gutter that he presumed to be from vehicles that had scraped the asphalt after crossing the valley gutter system at too high rate of speed; and (b) recalling his own driving experiences on that intersection. R. Vol. I, pp. 165-66. Mr. Watson did nothing more. He did not document any property damage or safety events relative to the gutter system, did not look into who designed the valley gutter system, did not look at the plans and specifications of the valley gutter system, and did not speak with anyone in the engineering staff regarding the history of the valley gutter system. R. Vol. I, p. 166. Not only is this evidence inadequate on its face, the City has not produced any contemporaneous documents supporting Mr. Watson's claim that his decision truly was rooted in consideration of policies. Such evidence does not satisfy the burden the City carries to establish entitlement to summary judgment on an exception that is to be closely construed.

The limitation of the discretionary immunity exception to decisions involving the consideration of "basic policy," *Ransom*, 113 Idaho at 204, 743 P.2d at 72, is consistent with the concerns regarding judicial review as set forth in the second step of the analysis. The Court has recognized its institutional limitations in reviewing government decisions that place one public

good over another. However, the Court has not used this second step as an excuse for denying Plaintiffs a forum to seek redress where the challenged conduct is not the product of policies promulgated by other coordinate branches of government. *Id.* at 206, 743 P.2d at 74. The courts are particularly well-equipped to address negligent conduct, such as the improper design of a gutter system. *See Sterling*, 111 Idaho at 230-31, 723 P.2d at 774-75.

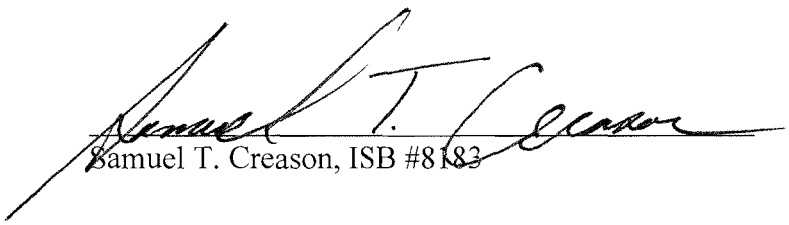
CONCLUSION

Both parties concede that Plaintiffs have been injured. The ITCA is to be liberally construed so as to accomplish justice. As a general rule, municipalities are to be held liable for their negligence. Exceptions to that rule are to be narrowly construed. Where engineering or design plans were drafted, the design immunity exception applies. The design immunity exception does not insulate the City from liability where it presents a plan that fails to conform with existing design or engineering standards and were never reviewed in advance by the proper authority. Even if the discretionary immunity exception were to be applied, it does not insulate a City from liability where the actor chose not to follow existing standards, failed to conduct a reasonable study, failed to investigate the reasons behind the existing infrastructure, and where the only evidence of consideration of policies is the affidavit of the actor saying that he individually considered policies.

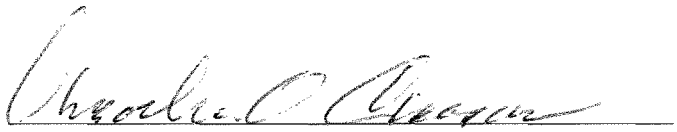
Plaintiffs request that the Court reverse the grant of summary judgment and remand this case for further proceedings.

DATED this 23rd day of October, 2012.

CREASON, MOORE, DOKKEN & GEIDL, PLLC



Samuel T. Creason, ISB #8183



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CERTIFICATE OF SERVICE

The undersigned does hereby certify that two copies of the foregoing APPELLANTS' BRIEF were served by the method indicated below and addressed to the following:

Brian K. Julian, ISB #2360	X	FIRST-CLASS MAIL
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Dated and certified this 23rd day of October, 2012.

Samuel T. Creason, ISB #8183