12-13-2012

Grabicki v. City of Lewiston Appellant's Reply 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

REPLY 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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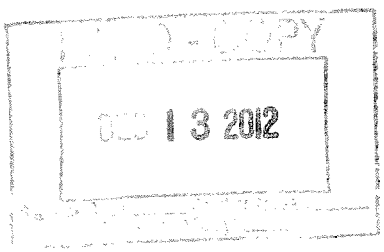

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STATEMENT OF THE CASE

A. NATURE OF THE CASE

Final judgment was rendered in this case, effective July 5, 2012. A notice of appeal was filed, raising a single issue for the Court to review:

> Whether the trial court erred in its March 20, 2008 grant of Defendant's Motion for Summary Judgment when it ruled the Defendant was immune from liability, under Idaho Code § 6-904(1), on the claim that Defendant acted negligently in the design and replacement of the valley gutter system with the bubble-up system at the intersection of Idaho Street and 21st Street in Lewiston, Idaho.

No other issues were raised. The City did not file a cross-appeal.

B. COURSE OF PROCEEDINGS

In its response brief, the City provided the Court with greater detail regarding events occurring between the time of Court's grant of summary judgment and this appeal. After the summary judgment order, each party filed a motion for reconsideration. Understanding the grounds of each party's motion is central to understanding the purpose and reliability of evidence that forms the foundation of the City's arguments in its response brief.

Thompsons filed a motion for reconsideration on April 3, 2008, asking the Court to reconsider its grant of summary judgment on discretionary immunity. R. Vol. I, p. 147-55. In support of that motion, the Thompsons filed the Affidavit of Bud R. Van Stone, which addressed whether Watson had authority to engage in a discretionary decision entitled to immunity, as found by the district court. R. Vol. I, p. 168-71. The City opposed Thompsons' motion for reconsideration with the affidavits of City Engineer, Lowell Cutshaw, R. Vol. I, p. 212-14, and the City's Director of Public Works, Joel Ristau, R. Vol. I, p. 206-08. The timing of the City's submission of those affidavits and the purpose for which those affidavits were offered is relevant

to the City's arguments in regard to both discretionary immunity (discussed at pages 11 to 13 and design immunity (discussed at pages 29 to 30).

The City filed its own motion for reconsideration on April 24, 2008. The City only sought reconsideration of the district court's denial of summary judgment "with regard to negligent maintenance" of the gutter system. R. Vol. I, p. 179-81. The City did not file any documents challenging the district court's denial of the City's motion for summary judgment on design immunity grounds.

ARGUMENT

A. PRINCIPLES FOR ANALYSIS UNDER THE IDAHO TORT CLAIMS ACT

Thompsons' Appellants' Brief sets forth the overarching principles governing an analysis under the Idaho Tort Claims Act ("ITCA"). *App. Br.* 7-11. The City did not dispute the applicability of those principles. The principles for an ITCA analysis are:

1. As a general rule, municipalities should be held liable for their negligent acts. *See Jones v. City of St. Maries*, 111 Idaho 733, 734, 727 P.2d 1161, 1162 (1986).

2. "The Act is to be *liberally construed* with a view toward accomplishing its aims and purposes and attaining substantial justice." *Czaplicki v. Gooding Joint Sch. Dist. No. 231*, 116 Idaho 326, 331, 775 P.2d 640, 645 (1989) (emphasis in original).

3. The exceptions to liability found in Idaho Code § 6-904 must be closely construed. *See id.*

Because the City seeks a ruling of immunity at the summary judgment stage, the Court must assume that (1) the City acted negligently, and (2) the City's negligent act caused damages to Thompsons.

B. THE CITY IS NOT ENTITLED TO SUMMARY JUDGMENT UNDER THE DISCRETIONARY IMMUNITY EXCEPTION

The Appellants' Brief set forth two reasons why this Court should reverse the district court's grant of summary judgment and remand this case for trial. First, the discretionary immunity exception does not apply where the damage resulted from a negligent plan or design. *App. Br.* 12-20. Second, even if discretionary immunity could be applied to this case, the City is not entitled to discretionary immunity on a summary judgment standard. *App. Br.* 20-26.

1. The discretionary immunity exception does not apply where the damage resulted from a negligent plan or design.

The discretionary immunity exception and design immunity exception hold distinct roles in the Court's immunity analysis. *App. Br.* 16. This conclusion is supported by the legislative history of the ITCA, *App. Br.* 13-16, the canons of statutory construction, *App. Br.* 16-17, and Supreme Court precedent, *App. Br.* 15, 17. While the distinction between the discretionary and design immunity exceptions may not render them mutually exclusive,[1] that distinction does require that the discretionary immunity exception not be interpreted to immunize a governmental entity from liability for damage caused by a negligent design where the entity is not entitled to immunity under the design immunity exception. *App. Br.* 12-13.

The City's construction on the Idaho Street intersection was pursuant to plans drafted by an assistant city an engineer, John Watson. This Court has held in *Bingham v. Franklin County*, 118 Idaho 318, 323, 796 P.2d 527, 532 (1990) and *Bingham v. Idaho Dep't of Transp.*, 117 Idaho 147, 149-50, 786 P.2d 538, 540-41 (1989) that the design immunity exception applies—and the

[1] Mutual exclusivity is not a question that need be addressed by the Court for disposition of this appeal.

discretionary immunity exception does not apply—where (1) the relevant governmental entity has made the decision to plan and design the project, and (2) the claim arises out of a harm caused by the project. The City does not dispute that it made the decision to plan and design the replacement gutter system or that the claim arises out of harm caused by the replacement gutter system. Therefore, the design immunity exception applies to this case; the discretionary immunity exception does not apply.

In its response brief, the City argues that it is entitled to immunity under both the discretionary and design immunity exceptions. The City supports its position by citing *Lawton v. City of Pocatello* as standing for the proposition that, under similar facts, the City of Pocatello could have established immunity under either the discretionary or design immunity exceptions. *Resp. Br.* 12. While the *Lawton* Opinion discusses these alternative immunities, 126 Idaho 454, 460, 886 P.2d 330, 336 (1994), the City urges an interpretation that would erroneously read *Lawton*'s discussion as presenting the exceptions in the conjunctive. However, a fair reading of the *Lawton* opinion shows that the Court found these exceptions applied in distinct circumstances. *Id.* The *Lawton* Court explained that if the trier of fact found that the governmental entity formulated a plan for improvements to the area in question, the applicable analysis was whether the design immunity exception applied. *Id.* "On the other hand, if the jury concludes that no plan or design existed, it would be required to determine whether the City is entitled to immunity under I.C. § 6-904(1)." *Id.* Thus, the *Lawton* opinion presents application of the design immunity exception and the discretionary immunity exception in the disjunctive. Furthermore, the *Lawton* Court did not hold that an exception necessarily applied, only that the governmental entity may argue the applicable exception under given facts. This interpretation of

Lawton is not only compelled by the plain language of the opinion, but it applies the *Lawton* opinion consistent with the Court's holding only three years' prior: "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).

The City next argues that it is entitled to either discretionary or design immunity by offering a false dilemma as follows:

1. The Thompsons' expert must find that Watson's drawing either substantially complied with existing standards or did not substantially comply with existing standards.

2. If the drawing substantially complied with existing standards, then the City is entitled to design immunity. If the drawing did not substantially comply with existing standards, then it is not truly an engineering plan and the City is entitled to a discretionary immunity analysis.

3. Therefore, the City is either entitled to design immunity or a discretionary immunity analysis.

Resp. Br. 13. This analysis fails because it seeks to confine the definition of "plan or drawing" to those plans or drawings that are in substantial conformance with engineering or design standards. Defining "plan or drawing" to include only those documents that already satisfy the design immunity exception renders the exception meaningless. The canons of statutory construction require that that statutory provisions be interpreted to be meaningful. Further, this Court has recognized the design immunity to be a distinct and meaningful exception in *Bingham v. Franklin County*, *Bingham v. Idaho Dep't of Transp.* and *Lawton.* If, on the other hand, the

City attempts to seize upon an expert's critique that finds a plan so patently insufficient it should not even be called an "engineering plan" as the basis for arguing that no plan or design exists, then the City's argument rests upon semantics and not merit. The existence of a plan for review is a necessary precedent to critiquing a plan as insufficient.

The City offered no response to Thompsons' legislative history and statutory analysis supporting a distinct application of the two exceptions. The City offered no explanation of how it would harmonize the reasoning of *Bingham v. Franklin County*, *Bingham v. Idaho Dep't of Transp.* and *Lawton* with its position that both exceptions apply. Based upon the authorities and analysis set forth in the Appellants' Brief and this Reply Brief, Thompsons ask this Court to hold that the City was not entitled to summary judgment on grounds of discretionary immunity.

2. Even if discretionary immunity analysis applied, the City failed to carry its burden of establishing that it was entitled to discretionary immunity as a matter of law.

Both parties use *Dorea*'s two-step process as the framework for a discretionary immunity exception analysis. Under *Dorea*, the Court first examines the nature and quality of the challenged action to determine whether it was one "involving consideration of financial, political, economic and social effects of a policy or plan." *Dorea Enterprises, Inc. v. City of Blackfoot*, 144 Idaho 422, 425, 163 P.3d 211, 214 (2007). Second, the Court examines the underlying policies of the discretionary function: "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.*

a) <u>The City failed to address the threshold inquiry: identifying the challenged action.</u>

The Appellants' Brief points out that the Court must necessarily identify the challenged action, before it can engage in a *Dorea* analysis. *App. Br.* 21-22. Here, Thompsons challenge the replacement of a gutter system that was designed and constructed in conformance with existing engineering standards with one that was not designed in conformance with existing engineering standards. Thus, in order to grant relief on discretionary immunity grounds, the Court must find that the City can exercise discretion to ignore engineering standards. Such a holding would stand in direct conflict with (1) the history and purpose of the ITCA; (2) the language of Idaho Code § 6-904(7); and (3) Supreme Court precedent, particularly *Burgess*, 119 Idaho at 308, 805 P.2d at 1232, that follows the dictates of common sense by holding that the government does not have discretion to choose to install unsafe infrastructure. The City's brief fails to address this threshold problem with its theory for relief.

b) The City failed to establish that the nature and quality of the challenged action was one involving consideration of financial, political, economic and social effects.

At the district court level, the City argued that it was entitled to summary judgment on discretionary immunity grounds based upon the decision-making of Mr. Watson and the City Council's approval of the 2003 Street Maintenance Project. R. Vol. I, p. 85. To support its argument, the City filed the Affidavit of John Watson and City Council records. R. Vol. I, p. 32-53, 54-71. The district court cited only to Mr. Watson's affidavit as factual support for its ruling that the City was entitled to discretionary immunity. R. Vol. I, p. 136, 273-74.

The City cannot establish entitlement to discretionary immunity because (A) the exception does not 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, *App. Br.* 22-24; and (B) even if the exception were expanded to such great breadth, the City still failed to establish that Mr. Watson engaged in the necessary review, *App. Br.* 25. The City responds by arguing that the Court should look to the review by higher ranking employees along with the consideration by Watson. This argument still fails to establish entitlement to discretionary immunity on a summary judgment standard.

Before proceeding to a determination on whether Mr. Watson exercised the necessary discretion, the Court must determine the nature of discretion that must be exercised. The City's brief does not dispute the Appellants' Brief's analysis on the rule of law that not all actions requiring discretion are entitled to discretionary immunity. *See App. Br.* 22. This rule is indispensable to a discretionary immunity exception analysis because "virtually all human endeavors . . . involve *some* type of discretion . . . ." *Sterling v. Bloom*, 111 Idaho 211, 227, 723 P.2d 755, 771 (1986) (emphasis in original) (citation omitted) (superseded on other grounds by statute). Therefore, this Court has reserved application of the discretionary immunity exception to those acts which "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).

Mr. Watson lacked the requisite authority to engage in the discretion required under Idaho Code § 6-904(1). *App. Br.* 23-24. The parties agree that this Court has declined to hold, as a bright line rule, that the decisions of low-ranking employees are never entitled to discretionary immunity. *App. Br.* 23 & *Resp. Br.* 16. Nevertheless, the Court has recognized that greater rank will generally coincide with decisions which involve the sort of policy

considerations which entitle the decisions to discretionary immunity. *See Dorea*, 144 Idaho at 426, 163 P.3d at 215. In *Dorea*, this Court held that the City of Blackfoot had discretionary immunity from a claim arising out of a decision made by the Department Supervisor of Blackfoot's sewage treatment plant, Jeff Guthrie. *Id.* at 424-26, 163 P.3d at 213-15. Thompsons' Appellants' Brief compared and contrasted the facts in *Dorea* with those presented on this appeal. *App. Br.* 23-24. In *Dorea*, the plaintiff did not dispute that Mr. Guthrie (1) was the supervisor of the relevant department, and (2) considered the City's resources, including money, budgets, manpower, and employee expertise. Mr. Watson did not hold a supervisory role, and the Thompsons dispute that Mr. Watson considered the City's resources.

The City provides no argument regarding why Mr. Watson had sufficient authority to entitle his decision to discretionary immunity (other than the mere assertion of such authority on page 16 of its brief). Rather, the City rests its argument on (1) the review of Mr. Watson's plan by Cutshaw and Ristau, and (2) the alleged approval of the 2003 Street Maintenance Project by the City Council. *Resp. Br.* 16-17.

Approval by Cutshaw & Ristau: The City seeks to insulate the decision of Watson based upon the review of his decision by Cutshaw and Ristau. *Resp. Br.* 16. The City cites the affidavits of Cutshaw and Ristau as support for this argument. Those affidavits do not establish entitlement to discretionary immunity as a matter of law.

Cutshaw's affidavit states that (1) he was the City Engineer at the time the decision was made to replace the Idaho Street gutter system; (2) he had authority to approve installation of the bubble-up system; and (3) he approved Watson's plans. R. Vol. I, p. 213 ¶¶2-4. Genuine issues of material fact exist regarding the extent of Cutshaw's authority and the nature of his approval

of Watson's plans. First, the Affidavit of Janice Vassar calls into question whether Mr. Cutshaw had authority to approve the replacement of the gutter system. R. Vol. II, p. 251-53. Ms. Vassar was the City Manager during all relevant times. *Id.* at ¶1. Ms. Vassar affied that during her time as City Manager, the City Engineering Department reported to the Public Works Director, who in turn reported to her. *Id.* at ¶¶3, 5. Ms. Vassar further stated that any substantial redesign of infrastructure would have required approval by the City Manager's office and perhaps the City Council. *Id.* at ¶9. Second, even if Cutshaw had this authority, the City has not presented sufficient facts regarding the nature of his approval of Watson's plans. Cutshaw's affidavit does not offer any support for the proposition that Cutshaw considered any policies prior to approving installation of the bubble-up system. In fact, Cutshaw's affidavit does not provide any detail regarding the nature of the decision to replace the gutter system.

Ristau's affidavit should not be considered by the Court, and does not establish a proper review even if considered. The City offered Ristau's affidavit without having identified Ristau as an individual likely to have discoverable information that the City may use. R. Vol. I, p. 231 ¶3. Based in part on that omission, Thompsons never took the deposition of Ristau. R. Vol. I, p. 231 ¶7.[2] The City should not be allowed to benefit from its omission, because its omission limits the Thompsons in the evidence available to them for challenging Ristau's affidavit. Even if the Court considers Ristau's affidavit, it does not provide any evidence that Ristau considered polices prior to making a decision, or even actually reviewed the engineering plans:

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[2] Thompsons requested leave of the district court to depose Ristau, should the district court decide to rely on his deposition. R. Vol. I, p. 231 ¶7. The district court did not consider Ristau's affidavit in its ruling on the motions for reconsideration, R. Vol. II, p. 271-80, rendering the Thompsons' request moot.

> In 2003, I was aware of the proposed plan to modify the storm water system at the intersection of Idaho Street and 21st Street in Lewiston, Idaho. From discussions with John Watson and/or Lowell Cutshaw, I had agreed with the plan and John Watson, the Assistant City Engineer, and/or Lowell Cutshaw, the City Engineer had been authorized to prepare plans to modify the storm water system at the intersection of Idaho Street and 21st Street. The new system would replace the then existing valley gutter drawing which was causing traffic problems.

R. Vol. I, p. 206 ¶4. As with Cutshaw, the Ristau affidavit does not provide any information that Ristau considered any policies prior to approving installation of the bubble-up system. In fact, Ristau's correspondence with Thompsons' counsel indicates just the opposite. Ristau did not believe that he exercised any discretion in choosing the bubble-up system over the valley gutter and did not believe that the engineering department had authority to choose the bubble-up system over the valley gutter. *Compare* R. Vol. I, p. 236 ¶2 *with* p. 238 ¶1.

The Cuthshaw and Ristau affidavits do not establish the City is entitled to discretionary immunity as a matter of law. The City carries the burden of establishing entitlement to an immunity exception. The City cannot carry this burden based upon two affidavits where its employees assert that (a) they made the decision, and (b) they believe they had authority to make that decision. The Cutshaw and Ristau affidavits do not provide any support for the required showing that the decision was the product of "a substantial amount of thoughtful determinations and elections among available alternatives." *Roberts*, 121 Idaho at 733, 827 P.2d at 1184.

Approval by City Council: The City did not submit any evidence that the City Council did anything more than review the bids for the 2003 Street Maintenance Project and approve the bid proposal from Poe Asphalt. R. Vol. I, p. 69. There is no evidence that the City considered, or was even aware of, the replacement of the Idaho Street gutter system. Thompsons provided

the district court with the sworn statements of several council members stating that they had no recollection of ever reviewing or discussing the replacement of the gutter system: Jeff Nesset (former Mayor), R. Vol. II, p. 255-57, Kevin Poole (former City Council member), R. Vol. II, p. 258-60, and Richard McMillen (former City Council member), R. Vol. II, p. 261-63. Therefore, the City has not established that it is entitled to discretionary immunity, as a matter of law, based upon the City Council's approval of the 2003 Street Maintenance Project bid.

Watson's Decision-Making: Mr. Watson did not engage in the sort of decision-making process that is immunized by the discretionary immunity exception. *App. Br.* 25. The City cites a single place in the record as support for its position that Watson's decision is entitled to discretionary immunity: The fourth paragraph to the Affidavit of John Watson, R. Vol. I, p. 33, ¶4.[3] *See Resp. Br.* 14. That paragraph states as follows:

> 4. As part of the Street Maintenance Project, I designed a plan for removing a three foot wide valley gutter which crossed Idaho Street at the intersections of Idaho Street and 21st Street in Lewiston, Idaho. The valley gutter was being replaced, among other reasons, because it was causing traffic problems. Cars had to slow down as they turned onto Idaho Street to avoid striking the pavement due to the extreme dip of the valley gutter.

The nature and circumstances surrounding this statement as well as additional evidence offered at summary judgment by the Thompsons create a genuine issue of material fact regarding whether Watson's decision falls within the discretionary immunity exception. As to the statements nature and circumstances, it is a *post hoc* justification, unsupported by any

[3] Both Watson's affidavit and the City's brief state that the gutter system was replaced because of traffic problems, among other reasons. *Resp. Br.* 4. Neither Watson's affidavit nor the City's brief provides any explanation as to what were those "other reasons."

contemporaneous documentation. In response to this affidavit, the Thompsons presented the district court with evidence that:

(1) 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;

(2) Watson's evaluation prior to rendering a decision consisted 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; and

(3) Watson 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.

The Thompsons's showing creates a genuine issue of material fact regarding whether the City is entitled to discretionary immunity based upon Watson's analysis.

The City makes its final argument in support of Watson's decision-making on the bottom of page 16 of its response brief. There, the City posits that the statute does not specify the nature of the decision-making necessary to entitle a person to discretionary immunity. The City argues that, as a result, the Thompsons' attacks on Watson's decision-making are unpersuasive. The City's argument is wanting for three reasons: First, the City fails to recognize that it carries the burden of establishing entitlement to an immunity exception, *Intermountain Const., Inc. v. City of Ammon*, 122 Idaho 931, 933, 841 P.2d 1082, 1084 (1992); particularly, on summary judgment.

Second, the interpretation of the discretionary immunity exception proposed by the City through this argument would render all decisions unassailable; if the City employee need do nothing more than make a decision after the sort of analysis performed by Watson, here, it is hard to imagine a City action that will not be entitled to discretionary immunity. Third, the City's argument contradicts this Court's established rule that only decisions including a "substantial amount of thoughtful determinations and elections among available alternatives" are entitled to discretionary immunity. *See Roberts*, 121 Idaho at 733, 827 P.2d at 1184.

The City sought and obtained summary judgment based upon the decision-making process of Watson. Thompsons presented evidence that, at the very least, created a genuine issue of material fact as to whether Watson engaged in the sort of decision-making process that is entitled to immunity. The City now responds by invoking the review of Cutshaw and Ristau. Even if the Court considers the affidavits of Cutshaw and Ristau, the City has still failed to establish that the approval to install the bubble-up system was the result of a substantial amount of thoughtful determinations and elections among available alternatives. For these reasons, the City has not carried its burden of establishing entitlement to discretionary immunity as a matter of law.

c) The City failed to establish that the policies of the discretionary function support a grant of immunity.

The second step in the *Dorea* framework is that the Court examine the underlying policies of the discretionary function. *Dorea*, 144 Idaho at 425, 163 P.3d at 214. The City sets forth argument regarding why the policies behind the discretionary immunity exception support a grant of immunity on pages 14 and 15 of its brief. The City argues that (1) municipalities are

generally granted broad discretion over streets and traffic; (2) Watson's decision regarded his concern about streets and traffic; therefore, (3) the City should enjoy a sort of broad discretion that immunizes it from judicial review. The City's syllogism fails because (A) it would render municipalities immune from review for any decision that could be tied to a concern regarding streets and traffic, regardless of the propriety or nature of that decision; and (B) it would render the second step in the *Dorea* analysis surplusage.

(A) The City's reasoning would render governmental entities immune from any decision regarding streets and traffic. The Supreme Court has issued several opinions on whether a particular decision regarding a street or traffic is entitled to discretionary immunity: *Lawton*, 126 Idaho at 460, 886 P.2d at 336, *Roberts*, 121 Idaho at 733, 827 P.2d at 1184 (Ct. App. 1991) *aff'd,* 121 Idaho 723, 827 P.2d 1174 (1992); *Bingham v. Franklin County*, 118 Idaho at 323, 796 P.2d at 532; *Bingham v. Idaho Dept. of Transp.*, 117 Idaho at 150, 786 P.2d at 541; *Leliefeld v. Johnson*, 104 Idaho 357, 363, 659 P.2d 111, 117 (1983). The existence of those opinions stands as a counterpoint to the City's proposed reasoning.

(B) The City reasons that because the challenged decision was as to an area over which it holds discretion, the policies behind the discretionary immunity exception necessarily dictate that no judicial review occur. *Resp. Br.* 15 ¶2. If the governmental entity need only show that a challenged action was discretionary, then there is no need for the Court to consider the underlying policies. The fact that the *Dorea* Court set forth a second separate step requires that the Court engage in analysis beyond determining whether the challenged act is discretionary.

The institutional limitations of the judicial branch do not necessitate this Court decline review. The City has not presented any evidence that anyone weighed available alternatives and

made a decision based upon an ordering of different public goods. Where the governmental entity fails to make such a showing, this Court will not use policy considerations as an excuse for denying injured parties a forum to seek redress. *See Ransom v. City of Garden City*, 113 Idaho 202, 206, 743 P.2d 70, 74 (1987). Nor would a reversal of the district court's grant of summary judgment unduly inhibit government actors. In *Ransom*, this Court found it persuasive that the legislature provides for the defense and indemnification of the subject government actors. *Id.* Those same protections exist here. Finally, a review here would not additionally constrain government actors as the ITCA has already constrained government actors in that it does not permit them discretion to deviate from engineering standards. *See Burgess*, 119 Idaho at 308, 805 P.2d at 1232.

The City failed to establish how the policies behind the discretionary immunity exception support a grant of summary judgment.

C. THE CITY IS NOT ENTITLED TO SUMMARY JUDGMENT UNDER THE DESIGN IMMUNITY EXCEPTION

The City asks the Court to assert a power that has long been rejected by the Idaho Supreme Court. The City asks this Court to review a denial of summary judgment, reverse that denial, and enter summary judgment for the City on the issue of design immunity, for the first time in this case. The City asks for this unprecedented remedy despite raising this request for the first time in a response brief, providing no authority in support of its position, and failing to interact with the mountain of adverse precedent. For these reasons, the Court should reject or decline to consider the denial of summary judgment as a ground for relief.

In addition to establishing why the district court's denial of summary judgment is not properly before the Court for review, this Reply Brief responds to the substance of the City's argument. Prudence dictates a response for two reasons: First, to the extent that the City's argument was an attack on the reliability of the Thompsons' analysis of why design immunity and not discretionary immunity was the only available exception in this case, the attack should be met. Second, this response establishes the propriety of the district court's ruling on this issue, should the Court entertain the City's appeal.

1. The District Court's denial of Summary Judgment on design immunity grounds is not properly before the Court

The Court should deny the City's request that the Court now consider granting alternative relief on the separate issue of design immunity because (a) the City failed to cite any authority that supports its argument that it should now be entitled to raise an additional issue; and (b) the denial of a motion for summary judgment is not ripe for review.

a) The City's failure to cite any authority bars it from entitlement to recovery on this ground.

The City asserts that it should be allowed to challenge the district court's ruling, for the first time in its Respondent's Brief. The City advances its challenge to the district court's ruling based upon (1) the Thompsons' discussion of the applicability of the design immunity exception in their Appellants' Brief, and (2) the legal authority of *Marcia C. Turner v. City of Twin Falls*, 144 Idaho 203, 211, 159 P.3d 840, 848 (2007). *Resp. Br.* 8. Neither supports the City's argument.

The Thompsons established that the City was not entitled to discretionary immunity in two ways: by demonstrating that the design immunity exception, if any, was the applicable

exception; and by demonstrating that even if the discretionary immunity exception applied, it did not immunize the City in this case. The Appellants' Brief shows that the design immunity analysis precludes the discretionary immunity analysis. The Thompsons did not invite the Court's scrutiny of the district court's denial of summary judgment, where the Court otherwise would not so have done. If the City wanted to dispute the district court's decision and reasoning for denying design immunity, then it should have filed a motion for reconsideration on that decision; not attempted to raise the issue for the first time in its Respondent's Brief on appeal. Because the City challenges a denial of a motion for summary judgment, the facts have not been fully developed in the record. The City's invitation for the Court to review the district court's denial of summary judgment on design immunity for error should be declined.

The only authority the City cites to support its assertion that it should be allowed to raise an alternative theory in its Respondent's Brief is *Marcia C. Turner v. City of Twin Falls*, 144 Idaho at 211, 159 P.3d at 848. The relevant portion of the *Turner* opinion upholds the established Supreme Court precedent that it will not consider arguments raised for the first time in the appellant's reply brief. *Id.* It provides no authority for the proposition that a Respondent who fails to cross-appeal may cure that failure by reading an issue into an appellant's initial brief. Thus, the City failed to provide any authority in support of its argument.

The City cannot prevail in obtaining the requested alternative relief, unless it first establishes a right to raise this additional issue on appeal. The City has not supported its assertion of its right to add this issue with both authority and argument. Therefore, the Court should not consider the City's assertion of entitlement to relief on this ground. *See Hurtado v. Land O'Lakes, Inc.*, 153 Idaho 13, 278 P.3d 415, 420 (2012) (holding that because a party failed

to support its position on a condition precedent to relief with both authority and argument, the Court would not consider the issue).[4]

b.) The district court's denial of summary judgment is not ripe for review.

"[A]n order denying a motion for summary judgment is not to be reviewed on appeal from a final judgment. The final judgment in a case can therefore be tested upon the record made at trial, not the record made at the time summary judgment was denied." *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 743, 9 P.3d 1204, 1209 (2000) (citations omitted); *see also Lewiston Indep. Sch. Dist. No. 1 v. City of Lewiston*, 151 Idaho 800, 808, 264 P.3d 907, 915 (2011). The district court did not preclude the City from offering evidence that it was entitled to design immunity at trial; it ruled that the City failed to establish entitlement to design immunity on a summary judgment standard. R. 140. The district court found that a genuine issue of material fact exists regarding whether the plan for the replacement of the gutter system was approved in advance of construction by the legislative or administrative authority. R. 139-40. The City asks this Court to reverse the district court's denial of summary judgment and, by its own authority, grant summary judgment on this ground. "However, 'an order denying a motion for summary judgment is neither a final order that can be directly appealed nor is it an order that can be reviewed on an appeal from a final judgment in the action.'" *Wesco Autobody Supply, Inc. v. Ernest*, 149 Idaho 881, 890-91, 243 P.3d 1069, 1078-79 (2010) (quoting *Courtney v. Big O Tires,* 139 Idaho 821, 823, 87 P.3d 930, 932 (2003)). "This rule is not altered by the entry of an appealable final judgment." *Garcia v. Windley*, 144 Idaho 539, 542, 164 P.3d 819, 822

[4] The question remains as to whether the City could establish entitlement to relief on this ground had it properly supported its position in its briefing. The City's failure relegates the question of its right to relief academic.

(2007). The clear and well settled rule in this state is that "Idaho appellate courts do not review a denial of summary judgment." *Id. See, e.g., Bowles v. Pro Indivisio, Inc.*, 132 Idaho 371, 376, 973 P.2d 142, 148 (1999); *Watson v. Idaho Falls Consol. Hospitals*, 111 Idaho 44, 46, 720 P.2d 632, 634 (1986).

Review of a denial of a motion for summary judgment would be an invasion of the district court judge's assessment that more facts should be developed before a dispositive ruling is pronounced. The district court judge's wisdom on a denial can only be considered in the light of the record the judge seeks to have developed. *Cf. Am. Pension Services, Inc. v. Cornerstone Home Builders, LLC*, 147 Idaho 638, 641, 213 P.3d 1038, 1041 (2009) (stating that review of the decision without consideration of the developed record would be unjust). The City will have its opportunity to develop facts supporting its position that it is entitled to design immunity at trial. The City will have its opportunity to bring dispositive motions prior to submission of this question to the jury. Should this issue survive, the question of the City's entitlement may ultimately be submitted to the jury; a result this Court has countenanced in the past. *See Lawton*, 126 Idaho at 460, 886 P.2d at 336. The City did not present any authority supporting its request that the Court overturn this well established rule. They City's request for this novel relief should be denied.

2. **The district court did not commit reversible error in denying the City's motion for summary judgment on the design immunity exception.**

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."

Id. (emphases in original). The City cannot carry its burden of establishing entitlement to design immunity on a summary judgment standard because a genuine issue of material fact exists regarding (1) whether a plan or design was prepared in substantial conformance with existing standards; and (2) whether the plan or design was approved in advance of construction by the proper entity.

a) Standard of Review

The first difficulty encountered in trying to review a denial of summary judgment is defining the proper standard of review. An appeal from the grant of a summary judgment is reviewed *de novo*. *Taylor v. McNichols*, 149 Idaho 826, 832, 243 P.3d 642, 648 (2010). The appellate court grants this free review despite the reality that a decision on a motion for summary judgment requires some consideration and weighing of facts—unlike the *de novo* review of a pure issue of law. In so doing, the appellate court benefits the non-movant. This is consistent with the other standards on summary judgment (e.g. liberal construction of facts in favor of the non-moving party) and the preference that issues be decided at trial. However, if an appellate court were to grant *de novo* review of a denial of summary judgment, it would be favoring the movant. The appellate court would be giving the movant a second try at avoiding trial, rather than ensuring that the non-movant has been properly dispatched without a trial. The City's brief did not provide the Court with any authority regarding what deference it should give the trial court in the review of a denial of summary judgment. Should the Court accept the City's invitation to develop a new avenue of review, it should also develop the appropriate corresponding level of deference for that review. A standard of review in favor of the non-movant would grant the trial court an abuse of discretion or clearly erroneous standard of review.

b) The City did not establish that the plan or design was prepared in substantial conformance with existing standards.

The City seeks to establish entitlement to summary judgment on design immunity under the theory that the plan was prepared in substantial conformance with existing standards. *Resp. Br.* 18, ¶3. This theory is an alternative ground for relief to the theory that the plan or design was approved in advance of construction by the appropriate authority. *See Lawton*, 126 Idaho at 459, 886 P.2d at 335 (emphasizing the disjunctive language in the statute). The Court should decline to review this theory because it is being presented for the first time on appeal. The City's argument also fails on its merits. The City failed to present an engineering or design standard with which Watson's design must substantially conform. Further, Thompsons established a genuine issue of material fact on this theory by entering the affidavit of licensed engineer, Roger Tutty, P.E., stating that the design plans were inadequate. Therefore, this Court should decline to consider the theory of substantial conformance as an avenue for relief. If does review this argument, it should dispatch of the City's theory on the merits.

The City's response brief marks the first time in this litigation that the City has argued the plan was prepared in substantial conformance with existing standards as a theory for relief. *See* R. Vol. I, p. 75-87 (Defendant's Memorandum In Support of Motion for Summary Judgment); R. Vol. I, p. 110-23 (Defendant's Reply Memorandum In Support of Motion for Summary Judgment); R. Vol. I, p. 182-93 (Defendant's Memorandum In Support of Motion for Reconsideration). As a result, the Thompsons had no reason to submit evidence on this point before the district court. Furthermore, the Court is left without any guidance the trial court might have given had the City raised this as an issue below. *See* R. 130-46 (Memorandum Opinion and

Order on Motion for Summary Judgment). This Court will not consider a theory not argued in the summary judgment proceeding before the district court. *Bauchman-Kingston P'ship, LP v. Haroldsen*, 149 Idaho 87, 94, 233 P.3d 18, 25 (2008). Therefore, the Court should decline to consider the City's argument on this theory.

The City's argument also fails on its merits. Thompsons submitted expert opinion regarding the sufficiency of Watson's design in the Affidavit of Roger Tutty, P.E. *See* R. Vol. I, p. 102-09. Mr. Tutty affied that the design plans were inadequate. *Id.* Mr. Tutty supported his position by identifying a number of omissions that render the plans inadequate. *Id.* The City addresses the opinion of Mr. Tutty by stating that the expert failed to provide sufficient information regarding the standard to which he held Watson's plans. *Resp. Br.* 18-19. The City assumes that Tutty was imposing strict liability. *Resp. Br.* 19. That assumption is not borne out by the record. Furthermore, even if that position were granted, it still does not support a grant of summary judgment. The dispositive question is not whether Mr. Tutty's analysis would withstand scrutiny by an opposing expert or careful cross-examination, but whether it creates a genuine issue of material fact. The expert opinion of a licensed engineer that the engineering plans were inadequate creates a genuine issue of material fact regarding this theory.

The City attempts to excuse the insufficiency of its engineering drawings by arguing that Court should not only consider the drawings, but also any descriptions contained in the bid tabulations and any descriptions that were not reduced to writing. *Resp. Br.* 19. The City's proposed liberal interpretation of the design immunity exception runs contrary to the interpretation principles specific to the ITCA. Exceptions to the general rule of liability, including Idaho Code § 6-904(7), "must be closely construed." *See Czaplicki*, 116 Idaho at 331,

775 P.2d at 645. Furthermore, even if the Court granted this liberal interpretation, the City has not explained what portions of the record should be reviewed or how those portions carry its burden of establishing entitlement to immunity for summary judgment.[5]

The City asserts that neither party has identified an applicable standard. *Resp. Br.* 18. The City's argument on this point actually strikes against the grant of summary judgment. Assuming the City is correct in its assertion, it could not have established entitlement to relief as a matter of law. The City bears the burden of establishing design immunity. *See Intermountain Const.*, 122 Idaho at 933, 841 P.2d at 1084. The City cannot carry that burden on a summary judgment review when it fails to provide the very engineering or design standards which it claims Watson's plans have met.

c) The City did not establish that the plan or design was approved in advance of construction by the proper entity.

The City argues that the denial of summary judgment should be reversed because the assistant city engineer's plan was reviewed and approved by the City Engineer and the Director of the Public Works Department. *Resp. Br.* 22. Once again, the City is attempting to prevail on an argument that it did not raise before the district court. There, the only argument set forth by the City in support of its claim for design immunity was that the plans were reviewed by the City

[5] Although the City does not provide any citation to the record in its argument, its Statement of Facts does cite to a description of materials found in a bid tabulation. *Resp. Br.* 5-6. That bid tabulation was generated by Mr. Watson well after creation of the plan, and was created to summarize the bids received by contractors for the City Council. R. Vol. I, p. 34, ¶7. This bid tabulation sets forth the contractors' bids on materials required for the entirety of the citywide 2003 Street Maintenance Project. Nevertheless, the City claims that Item 603-1 (requiring the contractor provide two catch basins) and Item 605-1 (requiring the contractor provide 100 12" PVC pipes) rebut Mr. Tutty's finding that the engineering plan does not substantially conform to existing engineering standards. Whether the obscure line items referenced by the City cure the problems identified by Mr. Tutty is a genuine issue regarding a material fact.

Council. *See* R. Vol. I, p. 80 (Defendant's Memorandum In Support of Motion for Summary Judgment). The district court denied the motion for summary judgment, finding that a genuine issue of material fact existed regarding whether the City Council actually reviewed the assistant city engineer's plan or just reviewed the bids from various contractors to complete the entirety of the 2003 Street Maintenance Project. R. Vol. I, p. 140. As set forth above, this Court should decline to consider arguments raised by the City for the first time in its response brief. *Bauchman-Kingston P'ship*, 149 Idaho at 94, 233 P.3d at 25. Even if the Court does consider the merits of the City's argument, a genuine issue of material fact exists.

The City characterizes the record as though the Thompsons successfully opposed the City's motion for summary judgment by "assert[ing] that the City must establish that the City Council itself must approve the design." *Resp. Br.* 22. The Thompsons' arguments regarding the nature of the City Council's review were in response to the grounds raised by the City for immunity. Whether review and approval by a given employee of the City was sufficient to establish design immunity was not litigated below.[6] The City now argues—having lost on the theory it decided to pursue before the district court—that it is entitled to design immunity because Cutshaw and Ristau reviewed Watson's plans. However, the sole purpose for which the City offered the affidavits of Cutshaw and Ristau was in support of its objection to the Thompsons' motion for reconsideration; a motion that argued that Watson lacked the authority to exercise the discretion necessary for *discretionary immunity*, upon which the Court granted

[6] The parties disputed the respective role and authority of various employees as part of the dispute on discretionary immunity. That dispute regarded whether a given employee had the authority to exercise discretion; there was no discussion regarding whether a given employee had the authority to approve a plan or design for purposes of the design immunity exception.

summary judgment in favor of the City.[7] The City should not be allowed to now seek a reversal of the denial of summary judgment on a theory argued for the first time in its response brief. *Bauchman-Kingston P'ship*, 149 Idaho at 94, 233 P.3d at 25.

Even if the Court considers the merits of this argument, the City still has not carried its burden of establishing entitlement to the design immunity exception. The relevant portion of section 6-904(7) immunizes a governmental entity from any claim arising out of a plan or design where the plan or design was "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 City failed to establish that the engineering plan was actually reviewed by the proper governmental entity. While Cutshaw affied that he actually reviewed Watson's plans, a genuine issue of material fact exists regarding whether Cutshaw had authority to approve installation of the bubble-up system. *See* page 13, *supra.* Ristau does not state that that he *actually* reviewed the design. R. Vol. I, p. 213 ¶4.

In *Morgan*, this Court held that the trial court did not err when it refused to instruct the jury on the design immunity exception where the governmental entity failed to present evidence that the employee approving the plan had authority to approve the plan. *Morgan v. State, Dept. of Pub. Works*, 124 Idaho 658, 664, 862 P.2d 1080, 1086 (1993). Here, a genuine issue of material fact exists regarding whether Cutshaw and Ristau had authority to approve installation

[7] *See* R. Vol. I, p. 174 Objection to Plaintiffs' Motion for Reconsideration ("The issue as to whether Mr. Watson had the appropriate authority is also resolved through the Second Affidavit of John Watson, the Affidavit of Lowell Cutshaw and the Affidavit of Joe Riatau[sic], all of which are filed contemporaneously herewith.")

of the bubble-up system. Further, the City failed to present evidence that Ristau actually reviewed the plans.

Even if the Court assumes Cutshaw and Ristau had authority within the City's organizational hierarchy, the statute does not extend immunity for plans approved by any person having authority. The City has not offered any legal authority for why approval by Cutshaw should be equated to the approval required by a "legislative body", "other body", or "administrative agency" as required by Idaho Code § 6-904(7). The legislative body for the City is the Lewiston City Council. The Idaho Code excludes city governments from the definition of agency in the Idaho Administrative Procedure Act. *See Gibson v. Ada County Sheriff's Dept.*, 139 Idaho 5, 7, 72 P.3d 845, 847 (2003).

Thompsons do not dispute that a proper review by the City Council would fall within the plain language of section 6-904(7). The record does not establish that the City Council reviewed and approved the plans. *See App. Br.* 18-19. The documentary evidence surrounding the Council's approval of the 2003 Street Maintenance Project shows that the Council approved a bid proposal for the 2003 Street Maintenance Project based upon the recommendation of its staff. R. Vol. I, pp. 58, 61-62, & 69. The record does not support a finding that the City Council approved Watson's plans in advance of construction. As set forth above, several council members had no recollection of ever reviewing or discussing the replacement of the gutter system: Jeff Nesset (former Mayor), R. Vol. II, p. 255-57, Kevin Poole (former City Council

member), R. Vol. II, p. 258-60, and Richard McMillen (former City Council member), R. Vol. II, p. 261-63.[8]

In its response brief, the City attempts to establish an alternative ground for summary judgment. Without filing a cross-appeal, the City essentially appeals a non-appealable order: the district court's denial of summary judgment. In its arguments on the merits of the design immunity exception, the City raises the theory that Watson's plans were prepared in substantial conformance with existing standards; an alternative theory that it did not raise before the district court. On the theory that it did raise (advance approval), the City changes the very nature of its argument (the party approving the construction). The City does this by relying upon affidavits that were not offered prior to the denial of summary judgment, and were not offered for the purpose of seeking reconsideration on that denial.[9] Despite all this, the City still has not shown that it is entitled to summary judgment on the issue of whether it can carry its burden of establishing entitlement to design immunity.

CONCLUSION

The City was granted summary judgment on immunity grounds. For purposes of this review, the Court must assume Thompsons have been injured. The Court must assume the City

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[8] Even if the design plans had been included in some packet received by the City Council members prior to approval of the 2003 Street Maintenance Project, the Council's general approval of the project should not be held to immunize the City from all claims arising out of actions taken pursuant to that approval. "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)).

[9] If such alternative grounds and arguments are considered, Thompsons question how a party could ever protect the record for appeal when opposing a motion for summary judgment.

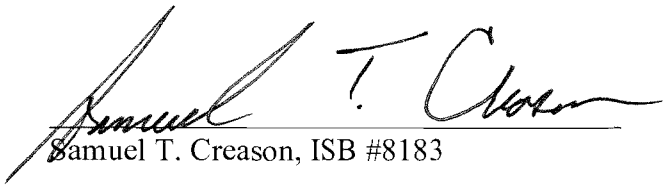
was negligent. The Court must assume that the City's negligence caused the Thompsons' damages. The purpose of the ITCA is to hold municipalities liable for their negligent acts, and the ITCA is to be liberally construed toward that end. When a municipality seeks to immunize itself from liability for its negligence, the exception to liability must be closely construed. The City bears the burden of establishing entitlement to this closely construed exception to the general rule of liability. To affirm the district court's grant of summary judgment, this Court must find that there exists no genuine issue of material fact on the record regarding whether the City is entitled to discretionary immunity.

The only issue before this Court is whether the City is entitled to discretionary immunity on a summary judgment standard. The only ruling necessary for this Court to make is that *Bingham v. Franklin County*, *Bingham v. Idaho Dep't of Transp.*, *Lawton*, and *Burgess* are still good law: the discretionary immunity exception does not apply where the damage resulted from a negligent plan or design. The record in this case is so much in Thompsons' favor, that they can and have addressed and met each of the arguments set forth by the City in its brief (even those raised for the first time).

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

DATED this 10th day of December, 2012.

CREASON, MOORE, DOKKEN & GEIDL, PLLC



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CERTIFICATE OF SERVICE

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

Brian K. Julian, ISB #2360	____x_____	FIRST-CLASS MAIL
250 S. Fifth St., Ste. 700, P. O. Box 7426	_____	HAND DELIVERED
Boise, ID 83707	_____	OVERNIGHT MAIL
(208) 334-5800	_____	FAX TRANSMISSION

Dated and certified this 10th day of December, 2012.

Samuel T. Creason, ISB #8183