

IN THE UTAH COURT OF APPEALS

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Butler, Crockett and Walsh	)	MEMORANDUM DECISION
Development Corporation,	)	(Not For Official Publication)
	)	Case No. 20050057-CA
Plaintiff and Appellant,	)	F I L E D
	)	(September 22, 2005)
v.	)	
	)	2005 UT App 402
Salt Lake County,	)	
	)	
Defendant and Appellee.	)	

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Third District, Salt Lake Department, 000904688  
The Honorable Robert K. Hilder

Attorneys: John Walsh, Salt Lake City, for Appellant  
David E. Yocom and Donald H. Hansen, Salt Lake City,  
for Appellee

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Before Judges Billings, McHugh, and Orme.

PER CURIAM:

Butler, Crockett and Walsh Development Corporation (Butler) appeals the trial court's dismissal of its complaint.

Butler filed its complaint against Salt Lake County (the County) in 2000, after the County denied Butler's application for a conditional use permit (CUP). The complaint alleged six causes of action, seeking monetary damages and the granting of the CUP. The trial court dismissed the first three causes of action in January 2003, determining that the claims were barred by governmental immunity under the Governmental Immunity Act. See Utah Code Ann. §§ 63-30-1 to -38 (1997).<sup>1</sup> The trial court dismissed the remaining claims in December 2004 based on failure to prosecute.

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<sup>1</sup>This chapter was repealed effective July 1, 2004, and a new governmental immunity act was enacted. See Utah Code Ann. §§ 63-30d-101 to -904 (2004). The former Act controls this case.

Butler asserts the trial court committed reversible error in its January 2003 order when it dismissed claims for failure to file a notice of claim and failure to file an undertaking. See id. § 63-30-12 (providing for notice of claim); § 63-30-19 (requiring an undertaking to be filed at the time a complaint is filed). However, the trial court did not dismiss the claims on those grounds. In its order, the trial court noted that Butler had complied with the notice requirements and that Butler had filed an undertaking, although untimely. The trial court then dismissed the claims based solely on governmental immunity. In sum, Butler's asserted error does not directly address the trial court's decision.

Butler does not show that the trial court erred in concluding that governmental immunity applied. In determining whether immunity applies, Utah courts have "looked to whether the injury asserted 'arose out of' conduct or a situation specifically described in one of the subparts of 63-30-10; if it did, then immunity is preserved." Ledfors v. Emery County Sch. Dist., 849 P.2d 1162, 1166 (Utah 1993). Courts will reject claims that reflect "attempts to evade these statutory categories by recharacterizing the supposed cause of the injury." Id. The theory of liability crafted by a plaintiff does not control. See id.

Although couched as a contract-based declaratory action, the substance of the complaint seeks affirmative relief, not just the declaration of rights under a contract. The breach cause of action demands that the trial court grant the CUP and damages. It does not request the trial court to enforce the contract through specific performance or declare the standard to which Butler is entitled under the contract. The additional causes of action in the complaint, although supposedly based on the same contract, go further afield from contract relief. One seeks a review and reversal of the County's decision; the others assert violations of due process and civil rights rather than contract-based actions. The complaint as a whole demonstrates that the underlying harm was the denial of the CUP.

Because the injury asserted arose out of conduct or a situation specifically described in one of the subparts of Utah Code section 63-30-10, governmental immunity is preserved. See Utah Code Ann. § 63-30-10. Section 63-30-10(3) expressly retains immunity for any injury that "arises out of, in connection with, or results from . . . the issuance, denial, suspension, or revocation or by the failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, approval, order, or similar authorization." Id. § 63-30-10(3). The denial of a CUP comes within the scope of this section, retaining immunity for claims arising from the denial of a permit. See id. As a

result, the trial court properly dismissed the causes of action based on governmental immunity.

The remaining causes of action were dismissed in December 2004 for failure to prosecute. Butler does not challenge that dismissal, but attempts to reach back to challenge prior rulings. However, because the prior rulings did not provide the grounds for the actual final dismissal, Butler's arguments are not on point. Butler has not shown that the trial court erred in dismissing the remaining claims for failure to prosecute.

Accordingly, the dismissal of Butler's complaint is affirmed.

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Judith M. Billings,  
Presiding Judge

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Carolyn B. McHugh, Judge

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Gregory K. Orme, Judge