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### Summary of Vermef v. Boulder City, 119 Nev. Adv. Rep. 60

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***Vermeff v. Boulder City*, 119 Nev. Adv. Rep. 60, 80 P.3d 445 (2003)<sup>1</sup>**

**TORTS**

**Summary**

Appeal from a district court order granting summary judgment in favor of the city after a homeowner filed a claim alleging faulty construction of a drainage channel was the proximate cause of flood damage to his house.

**Disposition/Outcome**

Reversed and remanded. The district court erred in granting summary judgment on Boulder City's behalf because the allegedly negligent acts were not committed during or intertwined with emergency actions, therefore, Boulder City was not immune from liability under NRS 414.110.

**Factual and Procedural History**

After extensive flooding occurred in Boulder City which resulted in the city and the State of Nevada declaring a state of emergency, appellant Vermeff claimed floodwaters damaged his front yard, driveway, and garage. He filed a complaint against Boulder City alleging that faulty construction of a drainage channel near his residence was the proximate cause of the flooding.

The district court granted Boulder City's motion for summary judgment on grounds that it was entitled to governmental immunity under NRS 414.110<sup>2</sup> and the Nevada Supreme Court's decision in *Nylund v. Carson City*.<sup>3</sup> Boulder City contended that the *Nylund* court interpreted NRS 414.110 to grant immunity to municipalities for pre-emergency negligence, as well as emergency management activities. Vermeff argued that NRS 414.110 was inapplicable because Boulder City's installation of the drainage channel did not occur during an emergency and did not comply with its own flood plan.

**Discussion**

Review of an order granting summary judgment is de novo.<sup>4</sup> Summary judgment is appropriate

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<sup>1</sup> By: Justen Ericksen

<sup>2</sup> Subsection 1 of NRS 414.110 reads, in pertinent part:

All functions under this chapter and all other activities relating to emergency management are hereby declared to be governmental functions. Neither the state nor any political subdivision thereof . . . is liable for the death of or injury to persons, or for damage to property, as a result of any such activity.

<sup>3</sup> 117 Nev. 913, 34 P.3d 578 (2001).

<sup>4</sup> *Tore, Ltd. v. Church*, 105 Nev. 183, 185, 772 P.2d 1281, 1282 (1989).

where the pleadings, depositions, answers to interrogatories, admissions, and affidavits on file show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law.<sup>5</sup> "A genuine issue of material fact is one where the evidence is such that a reasonable jury could return a verdict for the non-moving party."<sup>6</sup>

The purpose of NRS 414.110(1) is to immunize government entities from liability arising out of emergency management activities:

All functions under this chapter and all other activities relating to emergency management are hereby declared to be governmental functions. Neither the state nor any political subdivision thereof nor other agencies of the state or political subdivision thereof . . . is liable for the death of or injury to persons, or for damage to property, as a result of any such activity.

The *Nylund* court considered the scope of statutory immunity granted to governmental entities for emergency management activities and specifically determined "whether a government entity can claim immunity under NRS 414.110 for its pre-emergency negligence that contributed to damage caused by later emergency management activities."<sup>7</sup>

In *Nylund*, a flood occurred in Carson City and the city manager declared an emergency and requested State assistance.<sup>8</sup> Carson City employees determined that the best way to control the floodwaters was to channel the water down East Fifth Street.<sup>9</sup> After taking measures to do so, the floodwaters on East Fifth Street overflowed storm drains and flooded the Nylunds' condominium.<sup>10</sup> The Nylunds sued Carson City for the damage to their condominium claiming design defects in the storm drain system and Carson City's decision to channel the waters down East Fifth Street caused the flooding on their property.<sup>11</sup>

In affirming the district court's grant of summary judgment for Carson City, the Nevada Supreme Court broadly construed NRS 414.110 "to cover not only negligent emergency management, but also any previous negligence that contributed to the damage caused by the emergency management activities" (*i.e.*, any negligent pre-flood design, operation, or maintenance activities that are causally related to damage caused by the emergency management activities).<sup>12</sup> The *Nylund* court reasoned that this interpretation was a "natural extension of the policy underlying NRS 414.110. Because emergencies are sudden and unexpected, the court

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<sup>5</sup> NEV. R. CIV. PROC. 56(c); *see also* Great American Ins. v. Gen. Builders, 113 Nev. 346, 350-51, 934 P.2d 257, 260 (1997).

<sup>6</sup> Posadas v. City of Reno, 109 Nev. 448, 452, 851 P.2d 438, 441-42 (1993).

<sup>7</sup> *Nylund*, 117 Nev. at 916, 34 P.3d at 581.

<sup>8</sup> *Id.* at 914, 34 P.3d at 579.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 914-15, 34 P.3d at 580.

<sup>12</sup> *Id.* at 917, 34 P.3d at 581.

noted that the response authority does not have time to assess whether unknown or unforeseen obstacles created by past negligence will hinder its course of action."<sup>13</sup>

The *Vermeff* court then clarified its opinion in *Nylund*.

*Nylund* affords immunity to government entities for negligent emergency management and for pre-emergency negligence that contributed to the damage caused by the emergency management activities. Therefore, a government entity is afforded immunity for pre-emergency negligence when the damage caused by the negligent emergency management was exacerbated by the pre-emergency negligence.<sup>14</sup>

But, a government entity is not immune from liability for its pre-emergency negligence that is not intertwined with damage caused by later negligent emergency management activities. The court then explained that the purpose of NRS 414.110 is to grant immunity to government entities for actions taken during a sudden and unforeseen crisis. In *Nylund*, the court noted that immunity is granted for negligent emergency management activities because in "an emergency, the government entity leading the response operation does not have time to deliberate and chart a course calculated to provide the customary degree of due care."<sup>15</sup> To grant immunity for pre-emergency negligence, which is wholly independent from negligent emergency management, would not comport with the policy underlying NRS 414.110.

## **Conclusion**

The court concluded that because Boulder City's allegedly negligent acts were not committed during or intertwined with emergency actions, it was not immune from liability under NRS 414.110.

Although the damage to Vermeff's property occurred during an emergency, it was not a result of negligent emergency management on Boulder City's part. Vermeff did not allege that the damage to his property resulted from an emergency management decision; rather, Vermeff asserted that the damage was due solely to pre-emergency installation of the drainage channel adjacent to his home. Boulder City's actions in this case resulted from on-going flood retention planning occurring within Clark County as a result of community growth and continued seasonal flooding within the Las Vegas Valley.

Consequently, the court held that the district court erred in granting summary judgment on Boulder City's behalf and reversed and remanded.

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<sup>13</sup> *Id.*

<sup>14</sup> *See Nylund*, 117 Nev. at 917, 34 P.3d at 581.

<sup>15</sup> *Id.*