

1975

# Kenneth V. McKay and Betty McKay v. Salt Lake City : Brief of Appellant

Utah Supreme Court

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# IN THE SUPREME COURT OF THE STATE OF UTAH

SEP 17 1976

BYAM YOUNG UNIVERSITY,  
Reuben Clark Law School

KENNETH V. McKAY and BETTY McKAY, )  
husband and wife, )

Plaintiffs-Appellants, )

vs. )

SALT LAKE CITY, a Municipal )  
Corporation, )

Defendant-Respondent. )

Case No. 14149

## BRIEF OF APPELLANT

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# IN THE SUPREME COURT OF THE STATE OF UTAH

KENNETH V. McKAY and BETTY McKAY, )  
husband and wife, )

Plaintiffs-Appellants, )

vs. )

SALT LAKE CITY, a Municipal )  
Corporation, )

Defendant-Respondent. )

Case No. 14149

## BRIEF OF APPELLANT

### PRELIMINARY STATEMENT

The issues in this case were determined upon the basis of a Motion on the pleadings, consequently there is no transcript of proceedings. "R" refers to Record, and the parties will be referred to as in the Trial Court.

### STATEMENT OF THE KIND OF CASE

This is an action in two counts, the first seeking the recovery of damages caused to Plaintiffs' residential property as a result of certain road construction activities and the second, seeking damages for unlawful trespass committed by Defendant upon Plaintiffs' property.

## DISPOSITION IN LOWER COURT

After the case was at issue and awaiting trial, Defendant filed a Motion for Judgment On The Pleadings. Plaintiffs filed an objection to said Motion supported by the pleadings, Memorandum of Law and the Affidavit of one of the Plaintiffs. The Lower Court, after hearing upon the Motion, granted Summary Judgment in favor of Defendant. Thereafter Plaintiffs filed a Motion for Reconsideration of Summary Judgment, which was supported by a further Affidavit, the pleadings and applicable law, which Motion was, after hearing, denied. Thereafter Plaintiffs filed their Notice of Appeal.

## RELIEF SOUGHT ON APPEAL

Plaintiffs ask that the rulings and Judgment of the Lower Court be reversed and that the case be remanded for a trial upon the merits and issue of damages.

## STATEMENT OF FACTS

Approximately August, 1972, the Defendant began construction of street improvements in the vicinity of First South and University Streets in Salt Lake City, Utah, which consisted generally of widening First South, lowering the grade of said street, and relocating and redesigning the side-walk (R. 43,44). The construction activities thereafter continued at various intervals of time until approximately March of 1973, and to-date has not been completed. (r.44). During the course of the construction work the Defendant caused the grade of the street and side-walk adjacent to the Plaintiff's property to be substantially changed and in the process thereof removed the old side-walk and parking area, and as a result of substantial excavation removed the lateral support adjacent to Plaintiffs' property. Also the construction activities destroyed portions of the Plaintiffs' sprinkling system, removed substantial vegetation, ornamental plants, portions of stair-well thereby destroying access, and removed quantities of soil from Plaintiffs' property and trespassed upon the Plaintiffs' land and premises. (4.43, 44). (*Ex. p1, p2, p3*).

During the month of October, 1972, Plaintiffs contacted Salt Lake City Streets Commissioner Steven Harmsen, and advised him of the problems aforementioned and

further advised him that the access to the front of their property had been seriously impaired and their property diminished in value. Whereupon said Commissioner informed the Plaintiffs that they should not worry about the construction activities as he was confident the City would make a satisfactory adjustment of all items complained of. (R. 44). Commissioner Harmsen further advised Plaintiffs to present an architectural drawing of a retaining wall which they would desire to have constructed and that if the same met with the approval of the City Commission and the City Engineer the City would construct such a retaining wall. Thereafter the Plaintiffs presented to the Commissioner such a drawing and were advised to return at a later date after the plan had been presented to the Commission. (R. 45).

On October 13, 1972, Plaintiffs were advised by Streets Commissioner Harmsen that the City would construct the retaining wall in conformity with the plans presented, except for brick facing, which would have to be furnished by the Plaintiffs. Plaintiffs were also advised that a policy of liability insurance in favor of the Defendant would have to be secured to protect the City from liability by reason of leaving an open stair-well leading from the side-walk to the North entrance of the Plaintiffs' property. Plaintiffs agreed to all of these conditions and were then advised by said Commissioner that the matter would be resolved at the earliest possible date, weather permitting. (R. 45).

After several months' delay with no activities, the City resumed work on the retaining wall during February, 1973, the nature of which was contrary to the previously agreed plans. Upon inquiry the City Commissioner advised Plaintiffs that the Defendant had determined that it would prefer to allow the Plaintiffs a credit of \$2,400.00, or construct a wall of a different type. At that time Plaintiffs informed the said City Commissioner that they would have to confer with contractors and architects before a decision could be made to which the City Commissioner acquiesced and agreed. (R. 46). Plaintiffs contacted several contractors and conferred with an architect during the months thereafter and in July, 1973, had concluded from their investigation that the sum of money proposed by Commissioner Harmsen was totally inadequate; therefor, in early August, 1973, Plaintiffs retained counsel and advised the Defendant that it would be impossible to achieve the construction of the

retaining wall in the manner previously discussed. (R. 46,47). When the Defendant failed to take any further action, a formal claim was presented to the Defendant on September 28, 1973. (R. 5, 6, 7). The claim was thereafter denied and a Complaint was filed on August 26, 1974. (R. 1 - 7).

## POINT I

THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT WHERE ISSUES OF FACT EXIST AS SUPPORTED BY THE PLEADINGS, EVIDENCE AND APPLICABLE LAW.

Rule 56 of the Utah Rules of Civil Procedure prescribe the conditions under which a Motion for Summary Judgment may be pursued and this Court has repeatedly stated as set forth in *In re Williams Estates*, 10 Utah 2d.283, 348 P.2d 683, 685 (1960), that

“A Summary Judgment is proper only if the pleadings, depositions, Affidavits and Admissions show that there is no genuine issue of material fact and that the moving party is entitled to a Judgment as a matter of law.” See also

*Diamond T., Utah, Inc., v. Travelers Indemnity Co.* 21 Utah 2d. 214, 441 P.2d 705; *Willden v. Kennecott Copper Corporation*, 25 Utah 2d. 96., 476 P.2d 687; *Disabled American Veterans v. Hendrixson*, 9 Utah 2d. 152, 340 P.2d 416, and *Hatch v. Sugarhouse Finance Company*, 20 Utah 2d. 156, 434 P.2d 758.

A study of the pleadings, unrefuted Affidavits, and Exhibits P1, P2 and P3, clearly show that issues of fact exist.

This Court has earlier commented upon a similar factual situation in the case of *Hampton v. State Road Commission*, 21 Utah 2d. 342, 445 P.2d 708. In that action there was an alleged interference which a right of access to private property and this Court, quoting from the dissenting opinion of Justice Wolfe in the case of *State Road Commission v. Fourth Judicial District Court*, 94 Utah 384, 78 P.2d 502, set forth the following rule:

“Where that authority depends on the ascertainment of the fact of whether or not there is a ‘taking’ the Court may entertain the suit in order to determine what are the facts, and, consequently, whether the authority existed.”

Where, as in this case, it is alleged that the Defendant has removed and impaired the access of Plaintiffs’ property, the issue requires a factual determination and should not be summarily disposed of upon a Motion for Summary Judgment.



## POINT II

### PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE UTAH GOVERNMENTAL IMMUNITY ACT.

The pleadings, as supported by the unrefuted Affidavit of one of the Plaintiffs, shows that the Defendant began construction work in 1972, and continued thereafter intermittently until approximately March of 1973. (R. 44).

Shortly following the beginning of such work, the Plaintiffs and Defendant engaged in conferences and consultations to determine what action the Defendant would take to adjust and satisfy Plaintiffs' complaints, and Defendant made commitments to so do. (R. 43-48). At no time prior to the spring of 1973, did the Defendant advise or indicate that it did not intend to honor its prior commitments to adjust and correct grievances of Plaintiffs and even then, the Defendant merely presented an alternate plan, and acquiesced in Plaintiffs' request that they be given time to seek advice and study the proposal. In late July, 1973, after Plaintiffs were unable to obtain a contractor who would construct a retaining wall for the sum suggested in the counter proposal, Plaintiffs gave notice to the Defendant, and when no further action was taken and it became evident that the Defendant was turning a deaf ear to the matter, a formal claim was filed in compliance with the provisions of 63-30-13, Utah Code Annotated 1953. (R. 1-7, 43-48). These facts are supported by the Affidavits of one of the Plaintiffs (R. 43-48), and the Affidavit of one Albert G. Funk (R. 51-53), which the Defendant did not refute or present any counter Affidavits in opposition thereto.

The course of conduct, as disclosed by the file, reveals that from the inception of the street project the Defendant carried on a course of conduct which was reasonably designed to lead the Plaintiffs to believe that their property would be restored and that some curative action would be taken. It is the same type of action which this Court has previously stated it will not allow a person to engage in and then hide behind a statute of limitations where the action has caused the aggrieved party to be misled or lulled into a sense of false security. In the case of *Rice v. Granite School District*, 23 Utah 2d. 22, 456 P.2d 159, an insurance adjuster for the school district had led a claimant to believe that her claim would be adjusted and settled, and after the period of time to present a claim had expired, denied

relief claiming that the action was barred by reason of having failed to file a timely claim as prescribed by statute. This Court said:

*“ ‘Where the delay in commencing an action is induced by the conduct of the Defendant, or his privies, or an insurance adjuster acting in his behalf, it cannot be availed of by any of them as a defense.*

*One cannot justly or equitably lull an adversary into a false sense of security thereby subjecting his claim to the bar of limitations, and then be heard to plead that very delay as a defense to the action when brought. Acts or conduct which wrongfully induce a party to believe an amicable adjustment of his claim will be made may create an estoppel against pleading the Statute of Limitations.’ ”* (Emphasis added).

We respectfully submit that the pleadings, as supported by the undisputed Affidavits filed in opposition to the Motion for Summary Judgment, conclusively establish that the claim of the Plaintiffs was filed within a Ninety (90) day period after it became evident that the City had reniged on their commitment to adjust Plaintiffs' grievances.

It is to be further noted that the Second Cause of Action of Plaintiffs' Complaint seeks redress for damages incurred by reason of "trespass". It is our contention that redress for such a wrong is permitted under the provisions of 63-30-10 U. C. A. 1953. The Defendant takes the position that the action of the City constitutes an "intentional trespass" and therefore the cause of action is barred under the governmental immunity act. This position of the Defendant begs the issue of whether the conduct was intentional or unintentional. The pleadings are totally inconsistent with the position taken and asserted by the Defendant in this regard.

### POINT III

**DEFENDANT'S ACTIONS CONSTITUTE A TAKING OF PLAINTIFFS' PROPERTY AND GOVERNMENTAL IMMUNITY DOES NOT EXIST FOR SUCH TAKING OF PROPERTY.**

In view of the Lower Court's summary disposition of this case we are without the benefit of a total record supported by evidence which could have been developed in a trial of the issues, however, the file does, in our opinion, set forth and disclose sufficient matters to support Plaintiffs' contentions that the Defendant City has, by its conduct and activities, carried out work and /or committed omissions which constitute a "taking" of Plaintiffs' property without just compensation.

Whether or not there can be a recovery for this type of damage has been succinctly analyzed in the case of *Hampton v. State Road Commission*, *supra*. In that case this Court commented upon the issue of obstructing a driveway and set forth the following:

*“Does the obstruction of Appellants’ driveway constitute a “taking”?”*

*“In Dooly Block v. Salt Lake Rapid Transit Co., 9 Utah 31, 33 P.220, this Court determined that the rights of access, light and air are easements appurtenant to the land of an abutting owner on a street, and that they are property rights forming part of the owner’s estate. These rights “ ‘cannot be so embarrassed or abridged as to materially interfere with its proper use and enjoyment, and they are, in effect, property of which the owner cannot be deprived without due compensation.’ ” (Citing *State Road Commission v. Rozzelle*, 101 Utah 464, 120 P.2d 276.) (Emphasis added)*

*“The right of access to the highway however, is in the nature of a special easement, which exists as a right of ownership of abutting land, and is a substantial property right which may not be taken away or impaired without just compensation, and is subject only to a reasonable regulation\*\*\*the maintenance of a driveway into property exists as of right.” (Citing *Basinger v. Standard Furniture Co.*, 118 Utah 212, 220 P.2d 117).*

In view of the language of the *Hampton* case *supra*, it seems there can be no question but that the destruction and removal of the front entrance to Plaintiffs’ property constitutes a “taking” for which Plaintiffs should be compensated and for which a cause of action exists.

#### POINT IV

#### PLAINTIFF’S COMPLAINT FALLS WITHIN THE PERVIEW OF THE GOVERNMENTAL IMMUNITY ACT.

The Governmental Immunity Act, 63-30-1, et seq. Utah Code Annotated 1953, as amended, has waived governmental immunity, except as is expressly set forth in 63-30-10 (1) through (11), Utah Code Annotated 1953.

The closest exemption from waiver of governmental immunity for the activities of which Plaintiffs complain is sub-section 2 of Section 11 which reads as follows:

*“Arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, invasion of rights of privacy, or civil rights, or.”*

Plaintiffs’ First Cause of Action is founded, in part, upon the negligent destruction and removal of the stairway which affords access to Plaintiffs’ property, and the lateral support adjacent to Plaintiffs’ land.

In the claim filed on September 28, 1973, with the Salt Lake City Commission, in conformity with the mandates of 63-30-13, Utah Code Annotated 1953, as amended,

Plaintiffs set forth the details of these items.

We contend that nothing in the Governmental Immunity Act excludes the conduct of the Defendant as being exempt under the Governmental Immunity Act, and therefor Plaintiff may proceed under the provisions of 63-30-1, et seq. Utah Code Annotated 1953 for redress of the wrongs suffered by them by the conduct and/or omissions of the Defendant.

## POINT V

THE GOVERNMENTAL IMMUNITY ACT OF UTAH IS UNCONSTITUTIONAL AS IT VIOLATES THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION OF THE LAWS, AND DUE PROCESS OF LAW.

If defendant's contention is correct that the Governmental Immunity Act has not waived immunity to suit against Salt Lake City for the willful or negligent conduct of its employees within the framework of the facts of this case then it is asserted by the plaintiffs that the Governmental Immunity Act of Utah is unconstitutional as it violates the Equal Protections Clause to Section 1, 14th Amendment, *Constitution of the United States*, which provides:

“No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”

The Governmental Immunity Act of Utah has set up certain classes of wrongs which may be redressed by a citizen filing a claim against the governmental agency which has caused the wrong and, if the claim is rejected, he may bring suit in an appropriate Court for relief. Other persons however are excluded under the act from being able to bring actions against a governmental agency for wrongs perpetrated upon them. Therefor it is clear, and without plausible argument, that certain classes of persons have been denied “equal protection”; that is, that they may not have their wrongs redressed in courts because “governmental immunity” has not been waived as to them, although “governmental immunity” has been waived as to other classes of persons.

The net effect of the Governmental Immunity Act of Utah is that certain citizens have been denied access to the courts for redress of their wrongs. This in and of itself is a violation of Article 1 Section 11, *Constitution of Utah* which states:

“All courts shall be open, and every person, for an injury done to him in his person, property or reputation shall have remedy by due course of law, which shall be administered without denial or unnecessary delay,”

Since the beginning of our country the ancient Doctrine of Governmental Immunity has plagued the individual citizen with respect to the redressing of his rights and grievances against an offending government. We submit that this doctrine is outmoded, tyrannical, and not predicated upon sound principles of justice in a modern society.

Utah in its case decisions has consistently followed this doctrine. (See *Cobia v. Roy City*, 12 U.2d 375, 266 P.2d 986. At footnote 1 thereof the cases in Utah which adopt and follow governmental immunity are annotated).

It is submitted that the weight of authority no longer preponderates toward the maintenance of the Doctrine of Governmental Immunity.

In a 1957 case arising out of Florida, *Hargrove v. Coca Beach*, (Fla. 1957) 96 S.2d 130, 50 ALR 2d 1193, the Supreme Court of Florida observed:

“We have mentioned these incongruities in the application of the immunization of Florida merely to justify the position, which we here take, that the time has arrived to face this matter squarely in the interest of justice and place the responsibility for wrongs where it should be. In doing this we are thoroughly cognizant that some may contend that we are failing to remain blindly loyal to the Doctrine of Stare Decisis. However we must recognize that the law is not static. The great body of our laws is the product of progressive thinking which attunes traditional concepts to the needs and demands of changing times. The modern city is in substantial measure a large business institution. While it enjoys many of the basic powers of government, it none the less is an incorporated organization which exercises those powers primarily for the benefit of the people within the municipal limits who enjoy the services rendered pursuant to the powers. To continue to endow this type of organization with sovereign divinity appears to us to predicate the law of the 20th century upon an 18th century anachronism. Judicial consistency loses its virtue when it is degraded by the vice of injustice.

The court then went on to reverse all prior decisions in Florida holding that a municipal corporation was immune from suit under the Doctrine of Governmental Immunity.

This same trend has been followed in other progressive jurisdictions throughout the United States. In 1972, in a case arising in Michigan, *Friedman v. Farmington Township School District*, 40 Mich. App. 197, 198 N.W.2d 785, the Supreme Court of Michigan in discussing the question of the guarantees of equal protections under the Constitution held that the notice requirements under Michigan Statutes concerning governmental liability violated procedural due process guarantees under the Constitution as well as equal protection. This case cited an earlier case of *Reich v. State Highway Department*, 170

N.W.2d 267 (1969). The court stated:

“This diverse treatment of members of a class along the lines of governmental or private tort feasons bears no reasonable relationship under today’s circumstances to the recognized purpose of the act. It constitutes an arbitrary and unreasonable variance in the treatment of both portions of one natural class and is, therefor, barred by the constitutional guarantees of equal protection . . . Contrary to the legislature’s intentions to place victims of negligent conduct on equal footing, the notice requirement act is a special statute of limitations which arbitrarily bars actions of the victims of governmental negligence after only 60 days. The victims of private negligence are granted three years in which to bring their actions . . . Such arbitrary treatment clearly violates the equal protection guarantees of our state and federal constitutions. The notice provision is void and of no effect.”

In 1972, the New Yourk Court in the case of *Zipster v. Pound*, (1972), 69 Misc.2d 152, 329 N.Y.2d 494, a case again involving the notice requirements under the Governmental Immunity Act of the General Municipal Law of New York, held that the act was unconstitutional in that two classes of plaintiffs were created; those which were persons seeking redress under the general municipal law and those which if suing a private person were suing under the general negligence statutes of New York. The New York Court observed, after pointing out that a private plaintiff suing a private defendant had three years within which to assert the negligence claim but only had 90 days to file a formal notice of claim against the county, that:

“This is not justice. In the United States there should not be any second class plaintiffs just as there should not be any second class citizens. The United States Constitution guarantees equal protection of the laws to all. Enforcement of the short time limit of Section 50-E is unequal protection. It gives a numicipality an unfair advantage over a private litigant.”

“This is a denial of due process and equal protection of the laws under the Constitution of the United States and the Constitution of the State of New York.”

“Everyone must stand before the court without fear or favor.”

“In these modern times, no government should have rights superior to the people.”

“In the sports of baseball and basketball there is only one set of rules for the players on both sides. So should it be with the law.”

“When a law is unfair, arbitrary and gives only one-sided protection, it is not a true reflection of justice and good government. Such a law should and will not stand.”



In 1973, the hallmark case of *Ayala v. Philadelphia Board of Public Education*, 453 Pa. 584, 305 A.2d 877 was rendered. The Supreme Court of Pennsylvania in a wide-reaching and exhaustively documented decision ruled that the Doctrine of Governmental Immunity should be abolished in the State of Pennsylvania. The court said:

“We now hold that the Doctrine of Governmental Immunity long since devoid of any valid justification is abolished in this Commonwealth. In so doing, we join the ever-increasing number of jurisdictions which have judicially abandoned this antiquated doctrine.”

The concurring opinion to the *Ayala* case succinctly summarized the 12-page opinion by stating:

“I should like to add that the Doctrine of Governmental Immunity is unconstitutional as is the Doctrine of Sovereign Immunity. No branch of government—Executive, Legislative or the Judicial branch—can deprive a citizen of proper redress for a wrong. The denial of justice in any case is not constitutionally permitted.”

Since the *Ayala* case other states have joined the growing weight of judicial opinion that governmental immunity should be abolished. In 1974 North Dakota in *Kitto v. Minota Park District*, (1974) 224 N.W.2d 795 held that governmental immunity should no longer be the rule of law in North Dakota. The case stated:

“There is unanimity of opinion among respected legal scholars and recent judicial opinions that the Doctrine of Governmental Immunity has outlived its usefulness as a just instrument of the governmental policy.”

This case cites from the New Mexico case of *Barker v. City of Santa Fe*, 47 N.M. 85, 136 P.2d 480:

“It is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic, the medieval absolutism supposed to be implicit in the maxim, ‘the king can do no wrong’, should exempt the various branches of the government from liability for their torts, and that the entire burden of damage resulting from the wrongful acts of the government should be imposed upon a single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be born without hardship upon any individual, and where it justly belongs.”

In examining the Constitution of Utah there is nothing in that document which creates governmental immunity or for that matter sovereign immunity, but to the contrary Article I Section 11, cited above, specifically states that every person shall have a remedy by due course of law. Under the North Dakota Constitution, Section 22, Article 1 it is provided:

“All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law and right of justice administered without sale, denial or delay. Suits may be brought against the state in such manner, in such courts, and in such cases as the legislative assembly may, by law, direct.”

It is to be noted that this wording is almost identical with the Utah Constitutional provision except for the last sentence which reads, “Suits may be brought against the state in such manner, in such courts, and in such cases as the legislative assembly may, by law, direct.”

Two additional states have joined the ranks of declaring governmental immunity as unconstitutional and contrary to the modern concepts of justice. West Virginia on April 29, 1975, in the case of *Long v. City of Weirton, et al.*, S.E.2d.

This is the situation in which we find ourselves with respect to the Utah Governmental Immunity Act, which is solely a creature of the legislature, which has legislated upon a subject which the judiciary of the state had long held the special domain of the judiciary. The Governmental Immunity Act sets up waiver of immunity for certain wrongs, contractual or tort, but then in sweeping exemptions exempts others from the same rights and privileges as some would have who are entitled to the privileges granted by the legislative enactment.

Under the Governmental Immunity Act, subsection (2) of section 10 states that “invasion of rights of privacy” are not subject to the rights of redress of a citizen. This is clearly contrary to the existing philosophy of the Courts of the United States which holds that the right of privacy is a right which must and should be protected as well. New statutory laws which have been enacted to safeguard an individual’s privacy with respect to the federal government and in some instances state and local government agencies. See Public Law 93-579, 93rd Congress, December 31, 1974, “Privacy Act of 1974”. Codified as 5 UCS 552 A.

It takes little imagination to read through the exemptions of 63-30-10, UCA 1953 to see that those classes of persons who are entitled to redress if suing a private person have been denied this right if a governmental agency practices the same conduct upon them.



There can be little rationalization for such a double standard, when, the governmental agency can procure insurance to protect itself against its own conduct thereby alaying the ever-present fear of a "raid on the public treasury," such fear being the traditional basis upon which many of the governmental immunity cases have been predicated.

### CONCLUSION

A careful review of the pleadings and issues will, in our opinion, substantiate the irrefutable conclusion that substantial material and issues of fact have been raised which preclude the disposition of the issues of this case on a Motion for Summary Judgment. To conclude that this case is resolved and final on the basis of pleadings alone requires one to close their eyes to the gross misconduct and bad faith manifest by the Defendant City in dealing with one of its citizens' private property. To say that the "soverign" can with impunity remove the lateral support of a person's property, remove and destroy the access thereto, destroy the improvements upon the private property and remove the same and then hide behind the claim of Governmental Immunity is so repugnant to every concept of fair play and equity as to be shocking and totally untenable under every concept of law. We respectfully submit that for the reasons set forth heretofore and as supported by the authorities refered to, the Plaintiffs are entitled to have the issues of their claim tested before a Trial Court and accordingly the rulings of the Lower Court in summarily disposing of this case on a Motion for Summary Judgment should be reversed.

Respectfully submitted,

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