

1975

Kenneth McKay and Betty McKay v. Salt Lake City : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Brant H Wall; Attorney for Appellant.

Elliott J Williams; Worsley, Snow and Christensen; Ray L Montgomery; Assistant City Attorney; Attorneys for Respondent.

Recommended Citation

Brief of Respondent, *McKay v. Salt Lake City*, No. 14149.00 (Utah Supreme Court, 1975).
https://digitalcommons.law.byu.edu/byu_sc1/202

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

RECEIVED
LAW LIBRARY

SEP 17 1976

IN THE SUPREME COURT
OF THE STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

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

:

:

Plaintiffs-Appellants,

:

vs.

:

Case No. 14149

SALT LAKE CITY, a Municipal
Corporation,

:

:

Defendant-Respondent.

BRIEF OF RESPONDENT

ELLIOTT J. WILLIAMS
WORSLEY, SNOW & CHRISTENSEN
Seventh Floor, Continental Bank Bldg.
Salt Lake City, Utah 84101

RAY L. MONTGOMERY
Assistant City Attorney
Room 101, City & County Building
Salt Lake City, Utah 84111

Attorneys for Defendant-Respondent

BRANT H. WALL
Suite 500, Judge Building
Salt Lake City, Utah 84111

Attorney for Plaintiffs-Appellants

F I L L -
OCT 24 1976

Clerk, Supreme Court, Utah

TABLE OF CONTENTS

	<u>Page</u>
NATURE OF THE CASE.....	1
DISPOSITION IN LOWER COURT.....	1
RELIEF SOUGHT ON APPEAL.....	1
STATEMENT OF FACTS.....	2
ARGUMENT -	
POINT I: THE PLAINTIFFS' CLAIMS FOR DEPRECIATION OF PROPERTY VALUE ARE BARRED BY SOVEREIGN IMMUNITY.....	5
POINT II: THE PLAINTIFFS' CLAIMS ARE BARRED BY THE NOTICE PROVISIONS OF THE UTAH GOVERNMENTAL IMMUNITY ACT.....	10
POINT III: THE PLAINTIFFS' CLAIMS FOR TRESPASS AND EXEMPLARY DAMAGES ARE BARRED BY THE UTAH GOVERNMENTAL IMMUNITY ACT.....	16
POINT IV: THE PRINCIPLES OF GOVERNMENTAL IMMUNITY AND THE PROVISIONS OF THE UTAH GOVERN- MENTAL IMMUNITY ACT APPLICABLE IN THIS CASE ARE NOT UNCONSTITUTIONAL.....	17
CONCLUSION.....	19

CASES CITED

Bailey Service and Supply Corp. v. State Road Commission, 533 P.2d 882 (Utah, 1975).....	8-9
Cobia v. Roy City, 12 Utah 2d 375, 366 P.2d 986 (1961)	18-19
Fairclough v. Salt Lake County, 10 Utah 2d 417, 354 P.2d 105 (1960).....	8, 17-18
Gallegos v. Midvale City, 27 Utah 2d 27, 492 P.2d 1335, (1972).....	11

Hampton v. State Road Commission, 21 Utah 2d 342, 445 P.2d 708 (1968).....	9
Holt v. Utah State Road Commission, 30 Utah 2d 4, 511 P.2d 1286 (1973).....	7
Lynch v. United States, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1934).....	18
Niblock v. Salt Lake City, 100 Utah 573, 111 P.2d 800 (1941).....	6
Rice v. Granite School District, 23 Utah 2d 22, 456 P.2d 159 (1969).....	12, 13
State v. Tanner, 30 Utah 2d 19, 512 P.2d 1022 (1973)..	15

STATUTES CITED

Utah Code Ann. §63-30-2.....	11
Utah Code Ann. §63-30-3.....	6, 7
Utah Code Ann. §63-30-10 (Repl. Vol. 1968).....	16
Utah Code Ann. §63-30-13 (Repl. Vol. 1968).....	10-11
Utah Code Ann. §63-30-22 (Repl. Vol. 1968).....	17
Utah Code Ann. §78-11-9 (1953).....	9

TEXTS CITED

<u>Annotation</u> , 44 A.L.R. 3d 760 (1972).....	14
--	----

IN THE SUPREME COURT

OF THE STATE OF UTAH

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

Plaintiffs-Appellants,

vs.

Case No. 14149

SALT LAKE CITY, a Municipal
Corporation,

Defendant-Respondent.

BRIEF OF RESPONDENT

NATURE OF THE CASE

This is a property damage action arising out of road construction work undertaken on public domain adjacent to the plaintiffs' residential property.

DISPOSITION IN LOWER COURT

The District Court of Salt Lake County, the Honorable Stewart M. Hanson, Jr., presiding, granted summary judgment in favor of respondent Salt Lake City, no cause of action.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the judgment below.

STATEMENT OF FACTS

Appellants have failed to accurately state the undisputed material facts and a restatement of the facts is therefore necessary. The parties will hereinafter be designated as they appeared in the trial court.

Plaintiffs are owners of residential property located at 1334 East 1st South Street near the University of Utah campus in Salt Lake City, Utah. [R. 1] In August, 1972, Salt Lake City began a remodeling project to widen First South Street to accomodate the heavy traffic flow on this primary access route to the University campus. [R. 43] In order to do so, the City removed landfill, landscaping and other improvements, all of which were located on City property adjacent to the plaintiffs' property. [R. 43-44]

As a result of the construction work and the alteration of the grade of First South, the plaintiffs claim they were damaged because landscaping adjacent to their property was removed, access to their home was impaired and the City workers negligently damaged and trespassed upon their property during the course of the work. [R. 1-3]

In order to seek redress of their grievances, the plaintiffs met with City Streets Commissioner Stephen Harmsen

on October 13, 1972, while the construction work was still proceeding. [R. 45] They informed him of their complaints and, in particular, suggested that the City construct a decorative retaining wall adjacent to their property in place of the proposed wall planned by City engineers. [R. 44] The plaintiffs also wanted to construct, at their expense, a new stairway which would encroach upon City property. According to the plaintiffs, Commissioner Harmsen expressed concern and his belief that the City might be able to accomodate their wishes. [R. 45]

Since the decorative wall and stairway requested by the plaintiffs were to be constructed on City property, Commissioner Harmsen advised them to submit architectural drawings for consideration by the City Commission and the City Engineer. [R. 45] The plaintiffs did so and, although the City refused to pay for a brick facing on the wall, Commissioner Harmsen informed the plaintiffs that their wall would be built and, subject to acquiring insurance, they could build the stairway which would encroach upon City property. [R. 45]

On February 22, 1973, as the street remodeling project was nearly completed, the City began construction of the retaining wall adjacent to the City's sidewalk as it had

been originally designed by the City engineer. [R. 45] When they discovered this fact, the plaintiffs halted the work and immediately contacted Commissioner Harmsen to complain about the City's obvious change of heart. [R. 45-46] Commissioner Harmsen investigated the matter and on February 23, 1973, he informed the plaintiffs of the City's position. [R. 46]

According to the plaintiffs, Harmsen advised them that the City had decided to complete the street project as originally designed with a cement retaining wall adjacent to the City sidewalk, rather than adjacent to the plaintiffs' property. [R. 46] However, if the plaintiffs wished, the City was willing to pay them \$2,400.00 and the plaintiffs could build a decorative wall of their choice next to the sidewalk, provided it conformed to the City's specifications. [R. 46] The plaintiffs were also advised that they could build their stairway, but no other offers were extended, inferred or contemplated.

The road construction project originally causing the plaintiffs' complaints was completed in March, 1973.

[R. 44]

After receiving the City's final offer on February 23, 1973, the plaintiffs took no action to assert their claim for over five months until August, 1973, when they contacted an

attorney. [R. 46-47] A written notice of claim was finally filed on September 28, 1973, over seven months after Commissioner Harmsen had advised the plaintiffs of the City's final offer.

[R. 47]

Whatever the effect negotiations may have had on the plaintiffs' claim, if any existed, prior to February, 1973, the trial court held that there were no facts reasonably indicating that the City induced or encouraged the plaintiffs to delay prosecuting their claim after February 23, 1973. Since the plaintiffs failed to file a timely notice of claim after that date, the court granted summary judgment in favor of the defendant, no cause of action. (R. 58-60]

ARGUMENT

POINT I: THE PLAINTIFFS' CLAIMS FOR DEPRECIATION OF PROPERTY VALUE ARE BARRED BY SOVEREIGN IMMUNITY.

The law in Utah is irrefutably established that governmental entities are immune to suit for damages caused in the performance of governmental functions, unless immunity is expressly waived by the legislature. Governmental immunity has not been waived for plaintiffs' claims for depreciation of the value of their property caused by the alteration of public property adjacent to their home.

In the instant case, plaintiffs allege that the value of their property has been depreciated as a consequence of the remodeling of First South Street. In particular, the plaintiffs claim loss of adjacent lateral support and impairment of access due to alteration of the grade and width of the street. In short, the appearance and accessibility of their home was damaged by removal of landscaped City property.

With the adoption of the comprehensive Utah Governmental Immunity Act in 1965, the legislature prescribed the exclusive means by which claims may be asserted against governmental entities for damages caused in the performance of governmental functions. Utah Code Ann. §63-30-3 (Repl. Vol. 1968) states:

Except as may be otherwise provided in this act, all governmental entities shall be immune from suit for all injury which may result from the activities of said entities wherein said entity is engaged in the exercise and discharge of a governmental function. (Emphasis added)

In Niblock v. Salt Lake City, 100 Utah 573, 111 P.2d 800 (1941), the Court long ago determined that road construction work of the kind performed in this case is governmental, rather than proprietary, in nature. Thus, plaintiffs are entitled to recover damages only if the Utah Governmental Immunity Act so provides. It does not.

In Holt v. Utah State Road Commission, 30 Utah 2d 4, 511 P.2d 1286 (1973), this Court applied the Governmental Immunity Act in a situation virtually identical to the instant case and held the defendant immune. In Holt, the owners of property on the corner of an intersection sought damages caused by the construction of an underpass which lowered the grade of the street and impaired access to the plaintiff's property. Citing Utah Code Ann. §63-30-3, the Court observed:

This seems to indicate an intention that the act be strictly applied to preserve sovereign immunity; and to waive it only as clearly expressed therein. 511 P.2d at 1288.

Turning to the only conceivable provision of the Act that could arguably permit a suit for depreciation of property value as a result of impaired access to property, the Court held:

It is our opinion that reading Section 6 in the light of that rule, the waiver of immunity from suit "for the recovery of any property real or personal or for the possession thereof" cannot be construed to include an action of this character to recover damages for inconvenience of access to property....Id.

In view of the unequivocal language of Utah Code Ann. §63-30-3 and the clear intent of the legislature in consolidating the law of governmental immunity into one act,

the plaintiffs in the instant case are not entitled to a recovery of damages. No constitutional provision requires compensation to landowners whose access to and value of property are adversely affected by road construction work. As the Court stated in Fairclough v. Salt Lake County, 10 Utah 2d 417, 354 P.2d 105 (1960), in a case where landowners sought damages for depreciation of the value of their property caused by road construction work:

As to [damages for depreciation in preventing access], consistently and historically we have ruled that the State may not be sued without its consent; taken the view that Art. I, Sec. 22 of our Constitution is not self-executing, nor does it give consent to be sued, implied or otherwise; and that to secure such consent is a legislative matter....354 P.2d at 106.

It is also clear that Commissioner Harmsen's representations cannot waive governmental immunity preserved by the Act for the damages allegedly caused by loss of adjacent lateral support and convenience of access to the plaintiffs' property. In the very recent case of Bailey Service and Supply Corp. v. State Road Commission, 533 P.2d 882 (Utah, 1975), the trial court awarded damages for depreciation of property caused by loss of access when the State Road Commission allegedly stipulated to a waiver of governmental immunity. Reversing, the Court held that only the legislature can waive sovereign

immunity and the Road Commission's attempt to do so was without legal effect. The Court concluded:

Prior decisions of this court have established the principle that there can be no recovery from the State for damages where the construction of the highway or the erection of structures within the public right-of-way impair or adversely affect the convenience of access to the property of an abutting owner.
533 P.2d at 883.

In support of their claim for recovery of damage caused by loss of convenient access to their property, plaintiffs rely solely upon the case of Hampton v. State Road Commission, 21 Utah 2d 342, 445 P.2d 708 (1968). In Hampton, the Court held that governmental immunity for such damage had been waived by Utah Code Ann. §78-11-9 (1953). The plaintiffs neglected to add, however, that Utah Code Ann. §78-11-9 was repealed in 1971 and that the subsequent decisions of this Court have extinguished whatever vitality the Hampton decision once had.

In summary, the plaintiffs' claims for depreciation of the value of their property are barred by sovereign immunity. It is not disputed that the changes in the grade and width of First South Street were made in the public interest. In order to accomplish this project, it was

necessary to remove landscaped city property and improvements adjacent to the plaintiffs' property and to thereby alter lateral support and convenience of access. In recognition of public necessity, however, the legislature has retained the governmental immunity which bars the plaintiffs' claim for consequential damages.

Consequently, the Court should affirm the judgment of the court below.

POINT II. THE PLAINTIFFS' CLAIMS ARE BARRED
BY THE NOTICE PROVISIONS OF THE UTAH GOVERNMENTAL
IMMUNITY ACT.

The plaintiffs' complaint alleges that Salt Lake City negligently removed lateral support of the plaintiffs' property and negligently damaged landscaping and improvements in the course of the road construction project. The trial court correctly held that these claims as well as those previously discussed are barred because the plaintiffs failed to file a notice of claim within the time prescribed by the Utah Governmental Immunity Act.

A prerequisite to maintaining an action for damages against a political subdivision of the State of Utah is compliance with the statutory notice requirements set forth in the Governmental Immunity Act. Utah Code Ann. §63-30-13

A claim against a political subdivision shall be forever barred unless notice thereof is filed within 90 days after the cause of action arises....

A "political subdivision" is defined in Utah Code Ann.

§63-30-2 to mean any city.

In a long line of cases this Court has consistently and resolutely adhered to its conviction that strict compliance with the notice provisions is a prerequisite to maintaining any action against a governmental entity. As stated in Gallegos v. Midvale City, 27 Utah 2d 27, 492 P.2d 1335 (1972):

Inasmuch as the maintenance of such a cause of action derives from such statutory authority, a prerequisite thereto is meeting the conditions prescribed in this statute. A party seeking to obtain the benefit thereof should not be entitled to claim the favorable aspects which confer the rights, and disavow the conditions upon which the rights are predicated. 492 P.2d at 1337.

In the instant case, the plaintiffs filed a written notice of claim on September 25, 1973, nearly one year after meeting with Commissioner Harmsen in October, 1972, to complain about their damages. Their notice of claim states that all damages were incurred during 1972 and no basis for the delay in presenting their claim was stated therein.

In response to Salt Lake City's motion for judgment on the pleadings, plaintiffs alleged that Commissioner Harmsen induced them to delay filing their claim. Plaintiffs now cite this Court's decision in Rice v. Granite School District, 23 Utah 2d 22, 456 P.2d 159 (1969) in support of their contention. In the instant case, however, the trial court correctly held that the Rice decision is wholly distinguishable from the facts of this lawsuit and that a different result is warranted.

In Rice, the plaintiff submitted a formal claim to the school district and, thereafter, was contacted by an insurance adjuster who had statutory authority to accept or deny claims against the governmental entity. The adjuster reassured the plaintiff that the school district admitted all responsibility for her injuries and would pay all expenses as soon as they had been determined. Although she attempted to settle the claim on several occasions, the plaintiff was told that a settlement could not be made until she had been released by her treating physician. While the plaintiff patiently waited for a release from her physician, the statutory period for filing a lawsuit elapsed and the plaintiff's claim was denied. The Court correctly held that the delay in

prosecuting the plaintiff's claim was unfairly induced by the adjuster and that the school district was equitably estopped from alleging the limitations defense.

The instant case is clearly distinguishable from Rice for several reasons. First, Commissioner Harmsen had no statutory authority to authorize a compromise of the plaintiffs' claim and, therefore, the City could not be estopped by his actions. In Rice, the Court emphasized the importance of the status of the insurance carrier under the Governmental Immunity Act and stated:

The insurance carrier is specifically authorized to approve or deny a claim; therefore, we are not confronted by a fact situation wherein the agent's actions were not authorized by statute, and the governmental entity could not be estopped to assert the statute of limitations. 456 P.2d at 161 (Emphasis added)

Since the Governmental Immunity Act vests authority to settle claims only in the governmental entity, in this case the Board of City Commissioners, or its insurance carrier, Commissioner Harmsen was acting without authority and his individual actions cannot constitute an estoppel against the City.

Second, in Rice, the plaintiff was instructed to delay taking action until her damages could be ascertained at which time, she was told, a settlement offer would be made.

In the instant case, however, the City did not request or require inaction by the plaintiffs. To the contrary, on February 23, 1973, the City made its final offer and the plaintiffs had an opportunity to either accept it or to prosecute their claims according to the statute. Their inaction for nearly seven months thereafter is clearly not attributable to any action or inducement by the City.

Finally, it is well established that the doctrine of equitable estoppel cannot be invoked unless the plaintiff exercises due diligence in commencing the appropriate legal proceeding after the circumstances giving rise to estoppel have ceased to be operational. See, Annotation, Plaintiff's Diligence as Affecting his Right to have Defendant Estopped from Pleading the Statute of Limitations, 44 A.L.R. 3d 760 (1972). In the instant case, the plaintiffs were notified on February 23, 1973, that the City refused to grant their request for a decorative wall and, instead, intended to proceed to a completion of the road project as it had originally been designed. No other promises or representations were made. Whatever effect prior negotiations may have had on the limitations period, from that day forward the plaintiffs were

required to exercise due diligence in commencing the appropriate legal proceedings. Their failure to take action within 90 days cannot be attributable to any deception, inducement, promises or misrepresentation by the City.

Consequently, the claims alleged in plaintiffs' complaint are forever barred and the plaintiffs are not entitled to a recovery.

As the Court stated in State v. Tanner, 30 Utah 2d 19, 512 P.2d 1022 (1973), where land owners claimed tortious interference with water rights caused by construction of a highway:

The claim for compensation for this waste water being one sounding ex maleficio...defendants, if they had any claim at all, should have pursued an action under the Utah act having to do with waiver of immunity, which was not done, and which should resolve this case into a remand with instructions to vacate the judgment relating to this waste water. 512 P.2d at 1023. (Emphasis added)

Since the undisputed facts clearly demonstrate that plaintiffs failed to comply with the notice provisions of the Utah Governmental Immunity Act, the Court should affirm the judgment of the court below.

POINT III: THE PLAINTIFFS' CLAIMS FOR TRESPASS
AND EXEMPLARY DAMAGES ARE BARRED BY THE UTAH
GOVERNMENTAL IMMUNITY ACT.

In their second cause of action, the plaintiffs sought recovery of special and exemplary damages caused by the trespass of Salt Lake City employees upon their property during the construction project. The Utah Governmental Immunity Act expressly bars recovery of damages caused by trespass and expressly bars recovery of punitive or exemplary damages.

Utah Code Ann. §63-30-10 (Repl. Vol. 1968) waives governmental immunity for injury caused by negligent acts of governmental employees, but expressly reserves immunity when injury is caused by "intentional trespass." While plaintiffs characterize the alleged entry of Salt Lake City workmen upon their land during the construction activities as merely "trespass," the trial court correctly held that such conduct must have been "intentional" within the meaning of the statute and plaintiffs' claim for relief is therefore barred. The legislature clearly intended to retain governmental immunity when City employees enter upon the property of others to perform governmental functions.

The Governmental Immunity Act also prohibits any recovery for exemplary or punitive damages. Utah Code Ann. §63-30-22 (Repl. Vol. 1968) states:

No judgment shall be rendered against the governmental entity for exemplary or punitive damages.

Consequently, the trial court correctly granted judgment against plaintiffs, no cause of action, on their claim for general and punitive damages based upon trespass.

POINT IV: THE PRINCIPLES OF GOVERNMENTAL IMMUNITY AND THE PROVISIONS OF THE UTAH GOVERNMENTAL IMMUNITY ACT APPLICABLE IN THIS CASE ARE NOT UNCONSTITUTIONAL.

Plaintiffs assert that the long standing principles of law barring their recovery in this case deny their constitutional rights of due process and equal protection. Citing cases from the small minority of states where courts have abolished sovereign immunity on constitutional grounds or "in the interest of justice," they now ask the Court to judicially legislate a new system of law. The Court should refuse to do so.

In Fairclough v. Salt Lake County, 10 Utah 2d 417, 354 P.2d 105 (1960), the Court considered the constitutionality

of sovereign immunity in a case virtually identical to this action. The Court correctly held that the United States and Utah constitutions are not abridged by this well established and long standing phase of our law. Quoting Justice Brandeis in Lynch v. United States, 292 U.S. 571, 54 S. Ct. 840, 78 L.Ed. 1434 (1934), the Court stated:

"[C]onsent to sue the United States is a privilege accorded, not the grant of a property right protected by the Fifth Amendment....The sovereign's immunity from suit exists whatever the character of the proceeding or source of the right sought to be enforced. It applies alike to causes of action arising under acts of Congress... and to those arising from some violation of rights conferred upon the citizen by the Constitution....For immunity from suit is an attribute of sovereignty which may not be bartered away." 354 P.2d at 106-107.
(Emphasis in original)

The Court also held that no provision of the Utah constitution permits an action against a sovereign state nor does sovereign immunity violate any constitutional provision.

Since governmental immunity does not offend any constitutional right, the Court has wisely reserved to the people the choice of how and to what extent immunity shall be waived. In Cobia v. Roy City, 12 Utah 2d 375, 366 P.2d 986 (1961), the Court reaffirmed the validity of sovereign immunity and stated:

All of the members of this court, at one time or another have expressed the elementary principle that in cases of similar import we must not judicially legislate, but must, in our tri-partite form of government leave to the legislature whether there should be a waiver of immunity where one of the state's agencies is functioning in a governmental capacity, such as repairing streets....366 P.2d at 988-989.
(Emphasis added)

Governmental immunity is a well established and vital phase of our law. If it is to be changed, the change must come through the sovereign power of the state, the people, speaking through the legislature.

CONCLUSION

The principles of law governing the outcome of this suit have been frequently litigated and are now well established. Abutting land owners are not entitled to recover damage for the depreciation of their property occasioned by road construction work adjacent to their property. Removal of landscaped city property and city developments which enhanced the value of and access to the plaintiffs' home was necessary to accomodate the public's need. The legislature has determined that no recovery for the consequential private loss is allowed.

In addition, the plaintiffs' claims for damage to their property inflicted during the construction project as well as loss of value to the property were lost because they

failed to diligently pursue whatever rights they may have had. Without inducement, fraud or coercion by the City, the plaintiffs deliberated too long before deciding to reject the City's offer and to prosecute this claim.

Accordingly, since there are no disputed issues of fact, the trial court correctly interpreted the well established law of this state and granted summary judgment against the plaintiffs, no cause of action. That judgment should be affirmed.

Respectfully submitted,

Elliott J. Williams
WORSLEY, SNOW & CHRISTENSEN
7th Floor, Continental Bank Bldg.
Salt Lake City, Utah 84101

Ray L. Montgomery
Assistant City Attorney
101 City and County Building
Salt Lake City, Utah 84111

Attorneys for
Defendant-Respondent

**RECEIVED
LAW LIBRARY**

SEP 17 1976

**BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School**