

1976

Steven D. Walton And Ursula Walton, His Wife;  
Douglas P. Holbrook And Suzanne M. Holbrook,  
His Wife v. State of Utah, By And Through Its Road  
Commission v. Summit County And Summit Park,  
Inc. : Brief of Defendant-Respondents, State of  
Utah, By And Through Its Road Commission, And  
Third-Party Defendant-Respondent, Summit  
County

Utah Supreme Court

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#### Recommended Citation

Brief of Respondent, *Walton v. Utah*, No. 14532 (Utah Supreme Court, 1976).  
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IN THE SUPREME COURT OF THE STATE OF UTAH

STEVEN D. WALTON and URSULA :  
WALTON, his wife; DOUGLAS P. :  
HOLBROOK and SUZANNE M. :  
HOLBROOK, his wife, :

Plaintiffs-Appellants, :

-vs- :

STATE OF UTAH, by and through :  
its ROAD COMMISSION, :

Defendant and :  
Third-Party :  
Plaintiff-Respondent, :

-vs-

SUMMIT COUNTY and SUMMIT  
PARK, INC.,

Third-Party  
Defendants-Respondents.

BRIEF OF DEFENDANT-RESPONDENTS, STATE OF UTAH  
BY AND THROUGH ITS ROAD COMMISSION,  
PARTY DEFENDANT-RESPONDENT, SUMMIT COUNTY AND SUMMIT

APPEAL FROM THE JUDGMENT OF THE  
COURT OF THE THIRD JUDICIAL DISTRICT OF  
LAKE COUNTY, STATE OF UTAH, ENTERED IN  
DISTRICT JUDGE, PRESIDING.

FILED

AUG 5 - 1976

Clerk, Supreme Court, Utah

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STATE OF UTAH, by and through :  
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Defendant and :  
Third-Party :  
Plaintiff-Respondent, :

CASE NO. 14532

-vs- :

SUMMIT COUNTY and SUMMIT :  
PARK, INC., :

Third-Party :  
Defendants-Respondents. :

BRIEF OF DEFENDANT-RESPONDENTS, STATE OF UTAH,  
BY AND THROUGH ITS ROAD COMMISSION, AND THIRD-  
PARTY DEFENDANT-RESPONDENT, SUMMIT COUNTY

APPEAL FROM THE JUDGMENT OF THE DISTRICT  
COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR SALT  
LAKE COUNTY, STATE OF UTAH, HONORABLE JAMES S. SAWAYA,  
DISTRICT JUDGE, PRESIDING.

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IN THE SUPREME COURT OF THE STATE OF UTAH

STEVEN D. WALTON and URSULA  
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HOLBROOK, his wife,

Plaintiffs-Appellants,

-vs-

STATE OF UTAH, by and through  
its ROAD COMMISSION,

Defendant and  
Third-Party  
Plaintiff-Respondent,

-vs-

SUMMIT COUNTY and SUMMIT  
PARK, INC.,

Third-Party  
Defendants-Respondents.

CASE NO. 14532

BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

This action was brought by the plaintiffs-appellants to require the defendant to pay damages for allegedly destroying access to and the usefulness of their property.

DISPOSITION IN THE LOWER COURT

The original complaint and summons in the case was served on the defendant-respondent on the

28th day of August, 1974, (R-10). The defendant-respondent filed a motion to dismiss and accompanying memorandum and affidavit on the first day of October, 1974. (R-14, 15, 17, 18, 19 and 20). This motion came up for hearing on the 22nd day of October, 1974 (R-24) before Judge Jeppson who denied the defendant-respondent's motion to dismiss. Subsequently the defendant-respondent filed on the 25th day of October, 1974, a motion to reconsider (R-25) which was heard by Judge Bryant Croft on the 21st day of July, 1975. (R-29). Judge Croft denied defendant-respondent's motion to reconsider. (R-30, 31). Shortly thereafter a petition for interlocutory appeal was filed with the Supreme Court of Utah. (R-32-43). Subsequently the Supreme Court sent notice that said interlocutory appeal was denied. On the 30th day of October, 1975, the plaintiffs-appellants filed a motion to amend their complaint so as to include Douglas and Suzanne Holbrook as party plaintiffs. (R-48). Judge Croft granted plaintiffs-appellants' motion to amend their complaint on the 10th day of November, 1975. (R-53).

The defendant-respondent then filed their motion for summary judgment and accompanying memorandum on the 29th day of January, 1976. (R-91-94 and 99-105). Judge Sawaya granted the defendant-respondent's motion for summary judgment on the 26th day of February, 1976. (R-124, 125).

It is from this judgment that plaintiffs-appellants instituted their appeal.

#### RELIEF SOUGHT ON APPEAL

Defendant-Respondent, State of Utah, by and through the Road Commission and third-party defendant-respondent, Summit County, seek an affirmance of the summary judgment in their favor which was granted by the Honorable Judge James Sawaya.

#### STATEMENT OF THE FACTS

The plaintiffs-appellants were the owners of lots 12 and 14 on plat "E" of the Summit Park subdivision which is located just east of the top of Parleys Summit in Summit County, Utah.

In 1970 and 1972 (R-114) the defendant-respondent started acquiring various parcels of property in the Summit Park area. The parcels of ground were acquired for the purpose of widening I-80 and resurfacing of Summit Drive. Originally it was planned to use Summit Drive as a detour road during the construction of I-80. (R-22). The cul-de-sac on which the plaintiffs-appellants' lots are located goes off in a westerly direction off Summit Drive. (R-3).

In September of 1974, the defendant-respondent completed the resurfacing of Summit Drive. (R-94).



No property was acquired from the plaintiffs-appellants to enable the defendant-respondent to resurface Summit Drive. (R-17).

In August of 1971, the defendant-respondent, State of Utah, by and through its Road Commission, entered into a lease with the third-party defendant-respondent, Summit County. (R-85). The land was adjacent on the east to the plaintiffs-appellants, Waltons' property. The particular tract of land covered by this lease is the remainder of a lot that was purchased by the defendant-respondent. (R-114). Summit County then proceeded to locate an equipment and maintenance shed on the property located directly to the east of the plaintiffs-appellants, Waltons', lot. The shed houses maintenance and fire protection equipment for the protection of the homes and maintenance of the roads in Summit Park subdivision. (R-86).

That at no time prior to the filing of this action did the plaintiffs-appellants serve written notice on the defendant-respondent, Utah State Road Commission, and the Office of the Attorney General.

#### ARGUMENT

#### POINT I

THE DISTRICT COURT ERRED IN NOT GRANTING  
DEFENDANT-RESPONDENT'S MOTION TO DISMISS.

Plaintiffs-Appellants' action for the recovery  
of alleged damages to their property caused

by the resurfacing of Summit Park is barred by the Doctrine of Sovereign Immunity. The issue has been before the Utah Supreme Court repeatedly and only recently in the case of Holt v. Utah State Road Commission, 30 Utah 2d 4, 511 P.2d 1286 (1973) was ruled upon by the Court. In the Holt case, the plaintiffs alleged that the access restriction amounted to a taking and that under the ruling of Hampton v. Utah State Road Commission, 21 Utah 2d 342, 445 P.2d 708 (1968), they were entitled to damages.

The plaintiff in the Holt case urged the Supreme Court to decide the case on the precedent of the Hampton case. It is noted, however, that in the Holt decision no mention is made of the Hampton case. It is also noted that the Court did state:

" . . . The law has long been established in this State that under those circumstances (changing of grade and access impairment) there can be no recovery from the State for damages because the construction of a highway may impair or adversely affect the convenience of access to property. Sufficient has been said as to the pro and con of this subject that we think it unnecessarily and undesirable to extenuate thereon. But refer to the adjudicated cases." Holt v. Utah State Road Commission, Supra. (words in brackets mine)

The Court then referred to the cases supporting the above stated proposition which include Hjorth v. Whittenburg, 121 Utah 324, 241 P.2d 907; Fairclough v. Salt Lake County, 10 Utah 2d 417, 354

P.2d 105, Springville Banking Company v. Burton, 10 Utah 2d 100, 349 P.2d 157 and Anderson Investment Corp. v. State of Utah, 28 Utah 2d 379, 503 P.2d 144. In the Holt case, reference to Hampton v. State Road Commission is conspicuously absent. Defendant submits that the Hjorth case and the Fairclough case are still good law and the cases of Anderson Investment and Holt support this position.

It is apparent that the Hampton case has been so limited in its scope that it should only apply to cases of identical factual situations. The instant case involves a widening and change of grade almost identical to the Hjorth, Fairclough and Holt case and cases cited therein are, defendant submits, dispositive of the instant case.

The Court in the Holt case also dealt with the applicability of the Governmental Immunity Act, Section 63-30-1 through 63-30-34, Utah Code Annotated (1953 as amended). The Court cited Section 63-30-6 and 63-30-3 of the Act and concluded:

"In considering the possible application of the foregoing statute to the problem presented it is pertinent to note that Section 63-30-3 of the Act expressly provides for a continuance of sovereign immunity 'Except as may be otherwise provided in this Act . . . for any injury which may result from . . . the exercise . . . of a governmental function,' this seems to indicate that the Act be strictly

applied to preserve sovereign immunity; and to waive it only as clearly expressed therein. 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, nor as changing the law as set forth in the cases cited herein." Holt v. State Road Commission, Supra.

It is clear from the above statement that the Governmental Immunity Act does not allow recovery in cases such as the one pending before this court. It is also clear from the last sentence of the portion of the Holt case above cited that the law was not changed by the Hampton case and that the Hjorth, Fairclough, Anderson Investment and other cases supporting sovereign immunity represent the present law.

It is to be noted plaintiff's contention that the instant case differs from the cases denying recovery in that an allegation is made that the access impairment constitutes a "taking" and therefore, the Hampton case should control. The same contention was made in both the Anderson Investment case and the Holt case. The allegation that the State's impairment of access constituted a taking in these two cases was not sufficient to overcome a Motion to Dismiss. It is also noted that, according to appellant's brief, in the

Holt case, the dismissal was made even though no evidence had been taken.

"The record is extremely handicapped in view of the fact that there has been no evidence taken in support of plaintiff's Complaint." (P.12 of appellant's brief).

Defendant-appellant concludes by submitting that in cases where there has been no physical taking of an abutting owners property an action for damages cannot be sustained because of the Doctrine of Sovereign Immunity as expressed in the cases cited herein, Hampton v. State Road Commission, notwithstanding.

## POINT II

THE DISTRICT COURT DID NOT ERROR IN GRANTING DEFENDANT-RESPONDENT'S MOTION FOR SUMMARY JUDGMENT.

The major case which the plaintiff-respondent relies upon is Hampton v. State Road Commission, 21 Utah 2d 342, 445 P.2d 708 (1968). The Hampton case was instituted prior to the enactment of the Utah Waiver of Immunity Act, which was in July of 1966. In fact, the Hampton case specifically held:

". . . Consistently and historically we have ruled that the State may not be sued without its consent, taken the view that Article I, Section 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, a principle recognized by the legislature itself. . ." (Emphasis added).

The court went on to allow suit under Section 78-11-9, Utah Code Annotated (1953), which with the passage of the Waiver of the Sovereign Immunity Act, was repealed and replaced by Section 63-30-6, Utah Code Annotated (1953) as amended. The Supreme Court interpreted Section 63-30-6 in the Holt case, Supra. In the Holt case the court strictly construed 63-30-6 and preserved the defendant-respondent's sovereign immunity.

Arguendo, if the plaintiffs-appellants have a cause of action, they must follow the procedure as outlined in the Waiver of the Sovereign Immunity Act, Sections 63-30-1 through 34, Utah Code Annotated (1953). In neither the plaintiff-respondent's original complaint nor in their amended complaint is there an allegation as to compliance with the necessary requirements of the Waiver of Sovereign Immunity Act. (R-1 and 50).

The plaintiffs-appellants were required to give written notice of claim within one year after the cause of action arose.

In Sanford v. University of Utah, 26 Utah 2d 285, 488 P.2d 741 (1971), the Utah Supreme Court

considered a suit for damages against the State for changing the drainage pattern of surface water. The court there held that such an action constituted an action for private nuisance, and that it was included within the waiver of immunity under the Utah Governmental Immunity Act, Utah Code Annotated Section 63-30-1, et seq. (1967). That Act provides specific time limits for notice to governmental entities after a cause of action arises. Section 63-30-12 provides:

"A claim against the State or any agency thereof as defined herein shall be forever barred unless notice thereof is filed with the Attorney General of the State of Utah and the agency concerned within one year after the cause of action arises."

In Scarborough v. Granite School District, 531 P.2d 480 (Utah 1975), the Utah Supreme Court outlined the elements of a proper notice of Claim. The court there said:

"We have consistently held that where a cause of action is based upon a statute, full compliance with its requirements is a condition precedent to the right to maintain a suit. In order to so meet the requirements of the statute quoted above and fulfill its intended purpose, the "filing" of a claim should include these essentials: that it be in writing; that it contain a brief statement of the facts and the nature of the claim asserted; that it be subscribed by the party required to give it and who intends to rely on it; that it be directed to or responsible for receiving it; and that this be done within the prescribed time." 531 P.2d at 482.

The Supreme Court specifically held in that case that an oral notice would not comply with the statute. The court has also held that actual knowledge by the governmental entity or an investigation by the governmental entity would not comply with the statute. Varoz v. Sevey, 29 Utah 2d 158, 506 P.2d 435 (1973).

Furthermore, the fact that notice was given must be alleged in the complaint. In Roosendaal Construction & Mining Corp. v. Holman, 28 Utah 2d 396, 503 P.2d 446 (1972), the court held:

"A prerequisite in pursuing a claim against the State or its officers is a compliance with Section 63-30-12, U.C.A. 1953, which reads as follows:

A claim against the state or any agency thereof as defined herein shall be forever barred unless notice thereof is filed with the Attorney General of the State of Utah and the agency concerned within one year after the cause of action arises.

It appears that the plaintiff's complaint is fatally defective in that it does not allege compliance with that section." (R-10). (Emphasis added).

In this case no notice was given until August 28, 1974, which is the date of the service of summons in this case. (R-10). This is despite the fact the road in question was completed some two years earlier. (R-94). No notice was



alleged in the complaint. Plaintiffs' claim is, therefore, barred by the Utah Governmental Immunity Act.

The time for the filing of plaintiffs-appellants' notice of claim expired as of September, 1973. The road in question having been completed in September of 1972 (R-94).

The case of Johnson v. Utah-Idaho Cent. Ry. Co., 249 P. 1036, 1039-40 (1926), defines the law in Utah as to limitations of actions where there are continuing damages. There the plaintiff brought an action for damages to her property resulting from the construction and continued operation of a nearby railroad. She based her claim on nuisance, and on Article I, Section 22 of the Utah Constitution, asserting that her property had been "taken" or "damaged" within the meaning of the Constitution. The trial court found that although the injuries complained of were compensable, the plaintiff's claim was barred by the Statute of Limitations and directed a verdict for the defendant. On appeal she claimed that because the damages complained of were of a continuing nature and were increasing, the Statute of Limitations did not barr her claim. The Supreme Court affirmed the trial court in the following language:

"Where the wrong done by the railroad company is temporary in its nature, as in leaving cars unnecessarily on its track, or while engaged in the work of laying down its track, something existing today and not tomorrow, fluctuating in extent and depending on the ever-repeated action of the company, only such damages as have fully accrued prior to the commencement of the suit are recoverable, and none based upon any presumed continuance or repetition of the wrong.

But where the wrong is of a permanent nature and springs from the manner in which the track, as fully completed, affects approach to the lot, then, notwithstanding the right which the state retains to control the manner of use of a highway by a railroad company, even if deemed necessary to compel an entire removal of its track, the lot owner may treat the act of the company as a permanent appropriation of the right of access to his lot, and recover as damages the consequent depreciation in value of the lot.

. . .when the original nuisance is of a permanent character so that the damage inflicted thereby is of a permanent character, and goes to the entire destruction of the estate affected thereby or will be likely to continue for an indefinite period, and during its existence deprive the landowner of any beneficial use of that portion of his estate, a recovery not only may, but must be had for the entire damage in one action, as the damage is deemed to be original; and as the entire damage accrues from the time the nuisance is created and only one recovery can be had, the statute of limitations begins to run from the time of its erection against the owner of the estate or estates affected thereby." (Emphasis added).

Thus, where the injury, although continuous, is caused by a permanent structure or will likely continue indefinitely, there is but one cause of action arising from it, and the limiting statute

commences to run at the time the injury begins.

The plaintiffs-appellants allege the damage was caused by the resurfacing and widening of an access road, a permanent structure. Plaintiffs' sole cause of action for such injuries arose, at the latest in September of 1972, upon the completion of the road. The statutory period for filing a claim has long since expired.

Corpus Juris Secundum supports the rule established by the Utah courts. At 54 C.J.S. Limitations on Actions, Sec. 169, p. 128, it defines the term "permanent structure" as follows:

"A permanent structure as respects running of the Statute of Limitations has been defined as one which may not be readily remedied, removed, or abated at a reasonable expense or one of a durable character evidently intended to last indefinitely."

\* \* \*

"Where the case is such that all damages, both past and future can be presently estimated and recovered in one action, successive actions cannot be brought for recurring or continuing damages, and the statute runs from the time the original cause of action accrues."

\* \* \*

"An action for injuries to land from water seeping from a property constructed irrigation ditch which is intended to be permanent constitutes a single cause of action, and as affected by the Statute of Limitations accrues at the beginning of the injury." 54 C.J.S. Limitations of Actions, Sec. 173. (Emphasis added).

The law in other jurisdictions is also in agreement with the Utah law.

In Power Farms Inc. v. Consolidated Irr. Dist., 119 P.2d 717 (Cal. 1941), the plaintiff brought an action for damages caused by water seepage. A judgment in favor of the plaintiff was rendered by the trial court. The California Supreme Court, however, found that the plaintiff had failed to file a claim against the defendant according to a state statute and on that ground reversed the lower court's decision. In response to the argument that the statute had not run because of the continuing nature of the damage, the court stated:

"Where the time and extent of injury are uncertain, a statutory period of limitation begins to run when the fact that damage is occurring becomes apparent and discoverable, even though the extent of the damage may still be unknown." Id. at 721.

### POINT III

#### THE DISTRICT COURT ERRED IN GRANTING PLAINTIFFS-APPELLANTS' MOTION TO AMEND THEIR COMPLAINT.

Plaintiffs-Appellants' original complaint was filed in August of 1974. The original plaintiffs were the Waltons. (R-1 and 2). Subsequently on the 30th day of October, 1975, the plaintiffs sought to amend their complaint to join the Holbrooks as party plaintiffs. On November 10, 1975, Judge Croft granted plaintiffs-

appellants' motion to amend their complaint (R-53). As indicated on Page Nine of plaintiffs-appellants' brief, the plaintiff-appellant, Holbrook, learned of the resurfacing of Summit Drive in the latter part of 1972 (deposition of Holbrook, pages 9-10). As indicated in the previous arguments, the plaintiffs-appellants failed to file their appropriate notice of claim within the prescribed time. In Point II, it is stated that Summit Drive was completed in September of 1972.

In Section 78-12-26, Utah Code Annotated, (1953), the Statute of Limitations with respect to injuries to real property is three years. Following this to its logical conclusion, the Statute of Limitations would run as of September of 1975. In the instant case the plaintiffs-appellants, Holbrooks, did not seek to intervene in the lawsuit until October 30, 1975. (R-48). This would mean the plaintiffs-appellants, Holbrooks, were at least 30 days beyond the three year Statute of Limitation in which to commence their action.

#### POINT IV

THE DISTRICT COURT ERRED IN NOT GRANTING THE MOTION TO CHANGE VENUE WHICH WAS FILED BY THE THIRD-PARTY DEFENDANT-RESPONDENT, SUMMIT COUNTY.

The third-party defendant-respondent,

Summit County, filed their motion to change the place of trial to Summit County (R-67 and 111). In both of these motions, the District Court refused to change the place of the trial to Summit County.

Section 78-13-1 of the Utah Code Annotated, (1953) as amended, requires that injuries to real property must be tried in the county in which the cause of action arises. It is apparent from plaintiffs-appellants' complaint (R-1) that the property in question is located in Summit County.

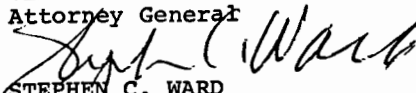
#### CONCLUSION

Judge James Sawaya correctly applied the provisions of the Governmental Immunity Act and because of the plaintiffs-appellants failure to comply therewith, justifiably granted the defendant-respondent's motion for summary judgment. Also that Judge Jeppson erred in not granting defendant-respondent's motion to dismiss since the State of Utah has not waived its sovereign immunity with respect to actions of this type.

It is for these reasons the Supreme Court should uphold the decision of the District Court and affirm the ruling of the Honorable Judge James Sawaya.

Respectfully submitted,

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