

2007

Hogs R Us, a Utah corporation, et al. v. Town of Fairfield : Amicus Brief

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

HOGS R US, a Utah corporation, et al.,

Plaintiffs/Appellants,

v.

TOWN OF FAIRFIELD,

Defendant/Appellee.

Case No. 20070872

Subject to reassignment to the Court of
Appeals

BRIEF OF *AMICUS CURIAE* UTAH SHARED ACCESS ALLIANCE

ON APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH
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STATEMENT OF INTEREST OF *AMICUS*

Utah Shared Access Alliance (“*Amicus*”), Utah’s largest motorized access advocacy organization, is a Utah non-profit corporation representing individuals and organizations having a combined membership of approximately 5,500 members. *Amicus* represents individuals and families who rely upon motorized vehicle access for business, family needs and recreation throughout Utah, including traveling on Utah paved highways, unimproved roads, and R. S. 2477 rights-of-way across federal lands located in Utah. *Amicus*’ members use motorized vehicles, including regular passenger vehicles and trucks, motorcycles, four wheel drive street-legal vehicles, and off highway vehicles such as ATVs, dirt bikes, snowmobiles and four wheel drive vehicles. *Amicus*’ and *Amicus*’ members’ uses of these vehicles directly depend upon access to Utah’s public highway system, including R. S. 2477 rights-of-way.

Amicus and its members regularly participate in local, state and federal agency land use planning to protect and preserve motorized access to and on public rights-of-way. *Amicus* and its members have been parties or *amici* in numerous state and federal court actions, administrative appeals, and other actions to preserve motorized access. The interests of *Amicus* and its members are directly implicated by this action as discussed herein.

SUMMARY OF ARGUMENT

1. Utah governmental authorities have a mandatory duty to “keep the road open and in suitable repair.” Therefore, Utah courts may issue writs of mandamus compelling governmental authorities to keep a public right-of-way open and in suitable repair. Such relief appears to be warranted in this action.

2. The legislature has no power to extinguish an authority’s mandatory duty to “keep the road open and in suitable repair.” The Court should approach Utah’s Rights-of-way Across Federal Lands Act with caution.

ARGUMENT

I. A Governing Authority Has a Mandatory Duty to “Keep the Road Open and in Suitable Repair.”

The common law and this Court have long recognized that a governing authority has a mandatory duty to “keep the road open and in suitable repair.” *Whitesides v. Green*, 44 P. 1032, 1033, 13 Utah 341 (Utah 1896). In *Whitesides*, decided immediately after Statehood, the Court stated,

“The right acquired by prescription and use carries with it such width as is reasonably necessary for the public easement of travel, and where the public have acquired the easement the land subject to it has passed under the jurisdiction of the public authorities, for the purpose of keeping the same in proper condition for the enjoyment thereof by the public. Such authorities are bound to keep the road open and in suitable repair, and, if obstructions be placed thereon, it is their duty to remove the same, and care for the rights of the public.”

A. This Duty Cannot Be Avoided or Exterminated.

The duty of a jurisdictional authority to “keep the road open and in suitable repair” recognized in *Whitesides* is fundamental. Rulings that authorities have nondelegable

duties¹ to protect the safety of the public exercise due care in maintaining roads within their boundaries, rest upon this bedrock duty.²

B. The Ministerial Duty to Keep the Road Open and in Suitable Repair Is Applicable to the Town of Fairfield.

Amicus understands that the road involved in this case is located within the territorial jurisdiction of the Town of Fairfield (“Fairfield”). Under *Whitehead* and the “nondelegable duty” authorities cited in App. Br. at 12-13, Fairfield has a ministerial duty to keep the involved road open and in suitable repair. *Amicus*, therefore, agrees with Appellants that Utah courts have the power of mandamus to enforce this ministerial duty. Further, the facts in this case, as understood by *Amicus*, strongly indicate that the road, considering its specific circumstances, has been historically used by large and small motorized vehicles, is seriously cratered, is harmful to motorized vehicles attempting to travel on it, and is dangerous to the public. Assuming such facts, the Court should appropriately find 1) that the involved road is not open and/or is not in suitable repair, and 2) that a writ of mandamus should issue.

¹ See authorities cited in App. Br. at pages 12-13.

² See Point II.A., *infra*, including Notes 8, 9. Limited temporary restrictions *consistent with* the authority’s mandatory duty to keep the road open and in suitable repair include: 1) the reasonable need of a highway authority to temporarily “close or restrict travel on a highway ... due to construction, maintenance work, or emergency,” § 72-6-114(a), Utah Code;² 2) the reasonable temporary closure of roads for national defense purposes, § 76-8-809, Utah code; and 3) the temporary re-routing of a portion of an R. S. 2477 right-of-way for environmental reasons, with an alternative replacement route portion being essential to keep the road open, § 72-5-105(3). These temporary actions apply uniformly to all users and modes of transportation.

C. Alleged Practical Problems Do Not Relieve an Authority from Mandamus.

Amicus realizes that an authority might complain of budgeting or other problems that might interfere with the authority's immediate ability to suitably repair a road. Such hypothetical problems, however, may not excuse a court from its duty to mandate an authority to fulfill its ministerial duty to suitably repair a road that has suffered "unsuitable" disrepair. Financial or other hypothetical problems, if *bona fide*, at most might allow the court to temper or temporarily withhold contempt sanctions upon an authority's failure to immediately comply with a writ of mandamus.³ However, in the meantime, the authority and the public would be on notice that the authority would likely be liable for injuries and damages to persons and property resulting from the authority's failure to repair the road, including economic damages. This would provide the authority with the incentive to address its problem sooner rather than later. Upon utter unwillingness or inability of an authority to comply with a writ of mandamus, the court could resort to punitive or creative sanctions. Here, such sanctions could include requiring Fairfield to accept the funds tendered by Plaintiffs and immediately use such funds to contract for repair of the road.

³ *Amicus* takes no position whether a court may order an authority to enhance its budget through bonding or taxation. However, here it appears that Fairfield has no financial excuse to not obey a writ of mandamus since Plaintiffs have offered to pay for the road repairs.

II. The Legislature Cannot Restrict or Extinguish a Governing Authority's Mandatory Duty to Keep the Road Open and in Suitable Repair.

Appellants' brief at page 20-22 argues that, since the legislature has adopted the Rights-of-way Across Federal Lands Act (the "ROWAFL act"),⁴ which declares certain duties regarding certain⁵ R. S. 2477⁶ rights-of-way discretionary,⁷ and, has not passed a similar law regarding the involved road, the legislature must have intended to preserve a mandatory duty of repair for the involved road.

Amicus urges the Court to avoid this argument as unnecessary based upon *Amicus*' argument in Point I or based upon other of Appellant's arguments. The Court should be careful not to undertake to construe the ROWAFL act where the statute's construction is not central to this appeal. This is because Appellants' argument misapprehends the

⁴ Part 3 of Chapter 5 of Title 72, Utah Code, § 72-5-301, *et seq.*

⁵ *Explicitly*: "improvement" of any R. S. 2477 highway under § 72-5-303(1)(b). *Possibly by implication*: "maintenance" of "a [R.S. 2477] highway [not] included on a highway system for vehicular travel" under § 72-5-303(1)(a).

⁶ Revised Statue 2477 (codified as 43 U.S.C. section 932) from the 1866 Mining Act, states "the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." While the grant was repealed in 1976, rights of way previously created under the statute were "grandfathered."

⁷ Section 72-5-103(1), cited by Appellants, states

(a) The state and its political subdivisions are not required to maintain highways within R. S. 2477 rights-of-way for vehicular travel unless the R. S. 2477 right-of-way encompasses a highway included on a highway system for vehicular travel.

(b) A decision to improve or not improve an R. S. 2477 right-of-way is a purely discretionary function.

power of the legislature.⁸ Appellant's brief at page 22 is incorrect when it states, "*As such, a court cannot compel the State through mandamus to maintain any R. S. 2477 right-of-way.*" That this is an erroneous statement of the law is shown by the following discussion.

A. Utah's Rights-of-Way Across Federal Lands Act Provisions Cannot Restrict or Extinguish Government Authorities' Mandatory Duty to Keep the Road Open and in Suitable Repair.

Utah's legislature and political subdivisions have never had the power to eliminate an authority's mandatory duty to keep the road open and in suitable repair. The Court may *not* in its analysis herein *assume* that Utah's legislature in the case of R. S. 2477 rights-of-way has *lawfully* restricted governing authorities' mandatory duty to keep their rights-of-way open and in suitable repair. When faced with an on-point case

⁸ Any suggestion that any legislative body has the power to extinguish the duty recognized in *Whitesides*, immediately implicates firmly established mandatory sovereign duties, and, fundamental rights of the public, including, but not limited to, the right to travel. This Court has recognized a right to travel under the Utah Constitution, in addition to the federal right, stating:

"The right to travel granted by the state and federal constitutions does not include the ability to ignore laws governing the use of public roadways. The motor vehicle code was promulgated to increase the safety and efficiency of our public roads. It enhances rather than infringes upon the right to travel.

City of Salina v. Wisden, 737 P.2d 981, 983 (Utah 1987). *See also*: The Law of Local Government Operations, Charles S. Rhyne, 1980, §16.9: "...a municipality has no power "to deny a citizen the right to travel upon the highway and transport his property in the ordinary course of his business or pleasure, though this right may be regulated in accordance with the public interest and convenience. Ordinary use is the right of all." *Escobedo v. State of California*, 35 Cal. 2d 870, 222 P. 2d 1, 9 (1950), overruled on other grounds at 499 P.2d 979, 984: "The use of highways for purposes of travel and transportation is not a mere privilege, but a common and fundamental right ..." *Also*, Note 9, *infra*.

requiring construction of the ROWAFL act the Court would need to carefully consider the implications of the inherent duty of a jurisdictional authority to keep the road open and in suitable repair. To suggest that the legislature has the power to restrict or extinguish a highway authority's sovereign duty to keep any R. S. 2477 right-of-way open and in suitable repair is to necessarily suggest that the legislature also has the power to restrict or extinguish an authority's mandatory duty to keep open and suitably repair major arteries, residential streets and state highways. The law has never ceded such chaotic discretion to the state legislature or to political subdivisions.⁹

B. The ROWAFL Act Could, in an Appropriate Case, Be Reconciled with the *Whitesides* Duty.

Proper analysis of Utah's ROWAFL act in an on-point case, would first attempt to reconcile the statute to *Whitesides*, which could, as shown by the following discussion, be accomplished. Otherwise, inconsistent provisions of the ROWAFL act would need to be stricken down.

For necessary perspective, it must initially be remembered that *Whitesides*' discussion of the common law mandatory duty to keep the road open and in suitable repair was specifically in reference to public rights-of-way by prescription, *Whitesides*, 60 P. at 1033, which is the precise derivation of all rights-of-way originally established across federal lands under R. S. 2477. That many R. S. 2477 rights-of-way today are very rough vehicle "trails," when compared to modern improved roads, means only that

⁹ Cf. *The Chicago Motor Coach Company v. The City of Chicago*, 337 Ill. 200, 169 N. E. 22, 25 (1929): "Even the legislature has no power to deny a citizen the right to travel upon the highway and transport his property in the ordinary course of business or pleasure ..."

they are similar to the rough, non-improved rights-of-way existing in 1866 when the federal law was adopted and in 1896 when *Whitesides* was decided. That in the more modern world many roads are graded or paved does not change the analysis of the responsible authority's duty regarding more primitive R. S. 2477 rights-of-way.

Most of Utah's ROWAFL act does not implicate the *Whitesides* duty. Subsection 72-5-303(1)(b), Utah Code, regarding R. S. 2477 rights-of-way, clearly does not affect a highway authority's duty to keep the road open and in suitable repair, as such provision states only that a "decision to improve or not improve an R. S. 2477 right-of-way is a purely discretionary function." Improvements to R. S. 2477 roads would include actions beyond those necessary to keep the road open and in suitable repair,¹⁰ such as paving, realigning, etc. Likewise irrelevant, is section 72-5-306(2),(3) (App. Br., at 22) which, at most, withdraws any waiver of sovereign immunity under the Utah Governmental Immunity Act in Title 63, Chapter 30d, Utah Code, for injuries resulting from use of R. S. 2477 rights-of-way. The withdrawal of waiver of sovereign immunity cannot eliminate the governing authority's mandatory duty to keep the road open and in suitable

¹⁰"Suitable repair" should be addressed in the specific factual context of the non-improved nature of the specific R. S. 2477 right-of-way, first allowing the authority to make its determination whether a proposed repair is, or is not, necessary as "suitable repair" considering the circumstances and history of the particular right-of-way. An authority's decision that an action was not necessary for "suitable repair" could be upheld if not arbitrary and capricious under the circumstances of the particular right-of-way and the specific repair issue. However, an authority's decision that *de facto* left the right-of-way completely impassible would clearly be arbitrary and capricious under *Whitesides*.

repair any more than the preservation of sovereign immunity for judicial functions could relieve a court of its mandatory duty to rule on cases within its jurisdiction.¹¹

Only in considering maintenance in subsection (a) of section 72-5-303(1) does the ROWAFL act come near to violating *Whitesides*. It should first be noted that this provision does not universally apply to “any R. S. 2477 right-of-way” per App. Br., but only to a right-of-way that may not be “a highway included on a highway system for vehicular travel” – whatever that means.¹² Next it should be noted that subsection (a) uses the word “maintain,” not the words “keep open and in suitable repair” per *Whitesides*. If “maintain” concerns routine maintenance above and beyond the authority’s duty “to keep the road open and in suitable repair,” then subdivision (a) would not conflict with *Whitesides*. However, if “maintain” is considered to include action necessary “to keep the road open and in suitable repair,” then subdivision (a) would unlawfully violate the *Whitesides* duty.

The definition of “maintenance” at section 72-5-301(5) may conflict with *Whitesides*, depending upon construction. For example, subsection 72-5-301(1)(5)(h) “clearing roadway of obstructing debris,” unless construed to mean “clearing roadway of

¹¹Regarding the duty to rule, see: *Richards v. District Court of Weber County*, 71 Utah 473 at 478, 267 P. 779 at 781 (1928) cited in *State v. Ruggeri*, 19 Utah 2d 216 at 219, 429 P.2d 969 at 970-71(1967); *Ketchum Coal Co. v. Christensen, Judge*, 48 Utah 214 at 221, 159 P. 541 (1916), cited *id.*; *State v. Hart, Judge*, 19 Utah 438, 57 P. 415 at 416 (1899) cited *id.*; *People of the Territory of Utah v. Van Tassel*, 13 Utah 9, 43 P. 625 at 626 (1896); *Hathaway v. McConkie*, 85 Utah 21 at 25, 38 P.2d 300 at 302 (1934). See also grounds for review under U. R. Civ. P. 65B(d) “(B) ... failed to perform an act required by law as a duty of the office, trust or station ...”

¹² *Amicus* is unaware of any definition of “a highway included on a highway system for vehicular travel” within the ROWAFL act. Under *Whitesides*, all public rights-of-way by prescription as a result of vehicular use are part of a highway system for vehicular travel.

obstructing debris that does not render the road closed or in unsuitable repair,” would violate *Whitesides*. Similarly, the general definition at the beginning of subsection (5),¹³ unless construed to accommodate *Whitesides*, would also potentially violate *Whitesides*. However, since subsection (a) regarding “maintenance” does not specifically declare maintenance decisions discretionary, as does subsection (b) regarding “improvements” decisions, the Court could readily find that the legislature did not intend subsection (a) to eliminate the *Whitesides* mandatory duty.

Again, the foregoing is not an invitation for the Court to now construe the ROWAFL act, but precisely the opposite. The Court should not slip into dicta that could unnecessarily confuse long established law and prejudice the rights of the public using R. S. 2477 rights-of-way and other highways. The fundamental duty in *Whitesides*, the navigational star, should not be explicitly or implicitly compromised.

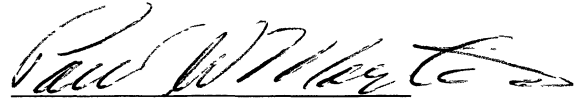
CONCLUSION

The Court should rule consistently with *Whitesides*, again recognizing that authorities have a mandatory duty to keep the road open and in suitable repair and that mandamus is an available remedy. The Court should approach the ROWAFL act with caution, being careful to not explicitly or implicitly compromise the *Whitesides* fundamental duty applicable to all highways, including *all* R. S. 2477 rights-of-way.

¹³ Subsection (5) reads, “‘Maintenance’ means any physical act of upkeep of a highway or repair of wear or damage whether from natural or other causes ...”

DATED this 8th day of February, 2008.

HANKS & MORTENSEN, P.C.

A handwritten signature in cursive script, reading "Paul W. Mortensen", written over a horizontal line.

Paul W. Mortensen

Attorneys for Amicus

Utah Shared Access Alliance

CERTIFICATE OF SERVICE

I hereby certify that I caused to be delivered by the method indicated below two true and correct copies of the foregoing AMICUS CURIAE BRIEF, in Case No. 20070872, postage prepaid, this 8th day of February, 2008, to:

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