

1996

Joseph D. Sanders v. The City and Municipality of
Draper, The Draper City Board of Adjustment, The
Draper City Planning Committee, The Draper City
Council, Charles L. Hoffman, Robert Brown, Kim
Stevens : Brief of Appellee

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Utah Court of Appeals

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JOSEPH D. SANDERS

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VS.

Case No. 960833-CA

Defendants/Appellees.

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IN THE UTAH COURT OF APPEALS

JOSEPH D. SANDERS

vs.

THE CITY AND MUNICIPALITY OF
DRAPER, THE DRAPER CITY BOARD OF
ADJUSTMENT, THE DRAPER CITY
PLANNING COMMITTEE, THE DRAPER
CITY COUNCIL, CHARLES L.
HOFFMAN, Mayor of Draper, ROBERT
BROWN, and KIM STEVENS,

Defendants/Appellees.

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: **BRIEF OF DRAPER CITY**
: **APPELLEES**
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: Case No. 960833-CA
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APPEAL FROM A DECISION OF THE
THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY,
JUDGES LEONARD H. RUSSON AND ANNE M. STIRBA

Oral Argument Priority Classification No. 15

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STATEMENT OF JURISDICTION

The Utah Supreme Court has appellate jurisdiction over this case under Utah Code Ann. § 78-2-2(3)(j). The Supreme Court is authorized to transfer this appeal to the Court of Appeals under Utah Code Ann. § 78-2-2(4). The Court of Appeals has appellate jurisdiction over this case pursuant to Utah Code Ann. § 78-2a-3(2)(k).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

The Draper City appellees accept the statement of issues 1 and 2 addressing plaintiff/appellant's claims against Draper as adequate for the purposes of this appeal. Draper City adopts and incorporates by this reference the standing issue identified by the Brown appellees in their brief.

DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS

Utah Code Ann. § 10-9-15 (1953):

The city or any person aggrieved by any decision of the board of adjustment may have and maintain a plenary action for relief therefrom in any court of competent jurisdiction; provided, petition for such relief is presented to the court within thirty days after filing of such decision in the office of the board.

Note: Sanders cites and relies upon provisions of Utah Code Ann. § 10-9-1001 and 1002 for his statute of limitation and private cause of action arguments. These statutes were enacted by the Legislature in 1991; whereas, the events giving rise to this action occurred in the 1980s and Sanders filed his complaint in April of 1990. Therefore, the provisions of §§ 10-9-1001 and 1002 are inapplicable to this appeal.

STATEMENT OF THE CASE

Despite the length of time required to dispose of this case at the trial court level, the case was and is relatively simple as it applies to the claims against Draper City, both factually and legally. In 1978, just after Draper had incorporated as a city, the Draper City Planning Commission denied an application for subdivision of a five acre lot into smaller parcels. In 1979 the City Board of Adjustment approved a variance on the same property which, after the addition of one adjoining acre of property, was approved for creation of three parcels or lots conditioned upon completion of some improvements. Sanders complains of this 1979 action and argues that it is void.

Also in 1979 the owner of one of the three lots created by the variance sold half of the lot to another, thereby creating an additional parcel. In 1988 the City granted a variance on the additional parcel, subject to certain conditions.

In April of 1990 Sanders commenced this action against the City and Municipality of Draper, the Draper City Board of Adjustment, the Draper City Planning Committee, the Draper City Council, and Charles L. Hoffman, Mayor of the City of Draper (collectively referred to herein as the "City") and against Robert Brown, Kim Stevens and John Does I through X. Sanders' claims against the City are essentially that (1) its 1979 variance was void; (2) the 1988 variance was improper; and (3) it has allegedly failed to enforce the conditions attached to the 1979 and 1988 variances.

In June of 1990 the Draper defendants filed with the trial court a motion to dismiss on the grounds that (1) they owed Sanders no duty on which he could base his claims, (2) the claims were barred by the governmental immunity statute, and (3) the claims were barred by running of applicable statutes of limitations. The trial court (Russon, J.) granted the motion and entered an order of dismissal of the Draper defendants on November 26, 1990.

Sanders subsequently proceeded with his claims against Kim Stevens and Robert Brown, for which judgment was eventually entered against him. He has now appealed to this Court.

STATEMENT OF FACTS

For purposes of review of the trial court's grant of the City's motion to dismiss, the facts are those contained in the Complaint, to be taken as true. Not all of the alleged facts, however, are material to the issues of duty and running of the statute of limitations, the grounds for which the dismissal was entered. Nor is this Court, as stated by Sanders (Appellant's Brief, p. 3 n. 1), required to accept as true those legal conclusions which are alleged in the Complaint.^{1/} To the extent necessary for an understanding of the legal and factual issues involved in reviewing the claims against the Draper City

^{1/} Allegations that the 1979 variance approval was illegal or that the property had been illegally subdivided are examples of such legal conclusions. However, because these conclusions are immaterial to the trial court's dismissal of the claims against the City, they are not discussed herein and should not color this Court's view of the relevant facts.

appellees, the statement of facts of the Brown appellees is adopted and incorporated herein by this reference.

1. In 1978 the Draper City Planning Commission denied an application to subdivide a five acre piece of property, part of which is the subject of this action. (R. 279-80).

2. In 1979 the Draper City Board of Adjustment approved a variance, subject to conditions, permitting the division of the five acre parcel and an adjoining one acre parcel into three lots. (R. 281-83, 580).

3. At all times relevant to Sanders' claims against Draper City, there was no mechanism to notify cities that property within their limits had been sold. Nor were there any statutes, ordinances or other requirements which would impose an affirmative duty on a city, or grant it power, to examine titles and conveyances of properties to determine whether subdivision violations were occurring, to prevent sale of noncomplying property or to void sales of property.

4. On July 20, 1988, the Draper City Board of Adjustment granted to Mountainwest and Ovard a variance, subject to conditions, on the front parcel. (R. 1554).

5. Sanders commenced this action by filing a Complaint dated April 23, 1990.

SUMMARY OF ARGUMENT

The private duty doctrine is well established in Utah law and provides that a tort claim may not be pursued against a governmental entity based upon a duty owed by the government to

the general public. Rather, the plaintiff must identify a recognized duty specifically owed to him rather than to the public at large. Sanders has failed to identify, either here or at the trial court level, any such duties which do not clearly fall within the public duty doctrine.

Sanders' argument that the public duty doctrine should be abandoned in Utah is weak and finds no support in recent Utah case law. In 1991 the Utah Supreme Court decided in a 4-1 decision not to do away with the public duty doctrine and in two 1993 cases applied the public duty doctrine to claims against governmental entities. It continued to recognize the public duty doctrine in 1996. Likewise, the Utah Court of Appeals has consistently and recently applied the public duty doctrine, most recently in 1994.

The trial court properly applied this well established doctrine when it decided that Sanders had identified no duty owed by the City to him as an individual as distinguished from a duty owed to the general public. The trial court's conclusion should be affirmed by this Court.

Aside from the fact that the City owed Sanders no duty, resulting in the failure of his tort claims, Sanders also failed to bring his action against the City within the statutory limitation periods. He initiated no judicial appeal of the board of adjustment decisions within the thirty day period, as provided by statute. Nor did he assert his more general claims until nearly eight years after they had accrued. Clearly, he has

failed to take action within the statutory limitation periods and his claims are barred.

In addition, Sanders' claims against the City are barred by the express provisions of the Governmental Immunity Act. The acts of granting permits and conducting investigations are clearly discretionary and are expressly immune from civil action.

The trial court properly applied the law to each of these claims. There is no basis in the record for a finding that the court improperly interpreted any of the legal issues involved. The judgment of the trial court should, therefore, be affirmed.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DISMISSED THE CLAIMS AGAINST THE CITY BECAUSE IT OWED NO DUTY TO SANDERS.

It is difficult to determine from Sanders' complaint and from his Appellant's Brief the exact nature of the duty which he believes the City owed him.^{2/} After urging the abandonment of the public duty doctrine, he alternatively argues that exceptions to the doctrine apply to him. However, he fails to allege or argue facts which would reasonably lead to the conclusion that he falls within one of the alleged exceptions. Nor does he identify a specific duty which the City owed to him as an individual. Rather, he argues that he should be permitted to pursue his claims against the city for "its failure to discharge its

^{2/} The Draper City appellees adopt and incorporate by this reference the argument that Sanders lacks standing to assert any claim in this action as set forth in the brief of the Brown appellees.

statutory duty to enforce the law.” He fails to specify what specific actions the city would be required to take, how those actions arise from a recognized legal duty and how such a duty would be owed to him as an individual rather than to the public at large.

A. THE PUBLIC DUTY DOCTRINE HAS BEEN OFTEN AND RECENTLY AFFIRMED BY THE UTAH SUPREME COURT AS APPLICABLE IN UTAH TO CLAIMS AGAINST MUNICIPALITIES. THE TRIAL COURT PROPERLY APPLIED THE DOCTRINE TO SANDERS’ CLAIMS.

Sanders relies on foreign case law for his argument that the public duty doctrine should be abandoned in Utah and in support of his assertions of various exceptions to application of the doctrine. This examination of the law of other states is, however, unnecessary. Utah has extensive and recent case law which deals with the public duty doctrine and clearly establishes the nature and scope of the law of this state under that doctrine.

To make a prima facie case of negligence, Sanders must first establish a duty of care owed by the City to him. *E.g.*, Ferree v. State, 784 P.2d 149, 151 (Utah 1989). Where there is no duty, there can be no negligence as a matter of law. Nelson By and Through Stuckman v. Salt Lake City, 919 P.2d 568, 572 (Utah 1996). The public duty doctrine defines the parameters of a duty owed by a governmental entity which is sufficient to form the basis for a negligence action:

For a governmental agency and its agents to be liable for negligently caused injury suffered by a member of the public, the plaintiff must show a breach of a duty owed him as an individual, not merely the breach of an obligation owed to the

general public at large by the governmental official.

Ferree at 151, citing Obray v. Malmberg, 484 P.2d 160, 162 (Utah 1971). See also Beach v. Univ. of Utah, 726 P.2d 413 (Utah 1986) (rules and regulations of the government-owned university were insufficient to establish a duty to a particular student as opposed to a duty to the university population at large).

Since Ferree and Beach, this Court and the Utah Supreme Court have had several opportunities to evaluate the applicability of the public policy doctrine. For example, in Rollins v. Petersen, 813 P.2d 1156 (Utah 1991), the Supreme Court identified the pragmatic nature of the analysis under the public duty doctrine and discussed when special relationships would establish a specific duty to an individual aside from any duty to the general public. The Rollins court identified the analysis as a pragmatic one in which the need to protect a particular plaintiff is weighed against the needs of the general public for the governmental entity to effectively do its job. Rollins 1160-61. Citing Ferree, the Rollins court noted that conversion of a general public duty to a specific duty owed to an individual would impose too broad a duty on public entities which would interfere with their abilities to perform their jobs. Rollins at 1160.

In Madsen v. Borthick, 850 P.2d 442 (Utah 1993), the Supreme Court again affirmed the trial court's application of the public duty doctrine to find no duty owed to the plaintiffs. The Madsen court held that statutory provisions did not create a duty owed

to the plaintiffs absent clear evidence of a special relationship and do not imply a duty beyond that imposed by the express language of the statute. Madsen at 446-47.

Also in 1993 the Supreme Court discussed the public policy surrounding the doctrine in Higgins v. Salt Lake County, 855 P.2d 231 (Utah 1993). The Higgins court acknowledged that there may be circumstances in which a governmental entity may owe a duty to a specific individual apart from that owed to the public at large. It noted that the approach to determining whether a special relationship exists sufficient to impose a duty is a policy-based one. Higgins at 236.

Determining whether the actor has a duty to prevent another's harm requires careful consideration of the consequences of imposing that duty for the parties and for society. We are loath to recognize a duty that is realistically incapable of performance or fundamentally at odds with the nature of the parties' relationship. Accordingly, in determining the existence of a duty, we examine such factors as the identity and character of the actor, the victim, and the victimizer, the relationship of the actor to the victim and the victimizer, and the practical impact that finding a special relationship would have.

Higgins at 237 (citations omitted).

The Higgins court also noted that its "pragmatic, policy-based analysis" generally has led to the conclusion that

if the broad claim for a special relationship and the consequent duty was accepted, the defendant in question would be unable to perform the duty without either radically changing its character or drastically circumscribing the function it was charged with performing.

Higgins at 237. While the Higgins court recognized that it may be appropriate to find a duty toward individuals or narrow classes of individuals, it “rejected the claims for broad categories of special relationships which operatively seem to be indistinguishable from a general negligence theory.” Id.

In 1996 the Supreme Court once again acknowledged the viability of the public duty doctrine, though holding that the municipality had assumed an independent duty toward the plaintiff. Nelson 919 P.2d 568.

This Court has also recently discussed and applied the public duty doctrine. Lamarr v. Utah State Dep’t of Transp., 828 P.2d 535 (Utah App. 1992) (under public duty doctrine, city owed no duty to pedestrian to control transients); Cannon v. Univ. of Utah, 866 P.2d 586 (Utah App. 1993) (public duty doctrine barred claims and University owed no special duty to plaintiffs); DeVilliers v. Utah County, 882 P.2d 1161 (Utah App. 1994) (county owed no duty to plaintiffs to install warning signs on county road).

Sanders argues that the public duty doctrine should be abolished in Utah. The cases he cites are all foreign cases older than the recent Utah cases addressing and applying the doctrine. Also, Rollins clearly rejects this argument. In Rollins, Justice Durham, in her concurring and dissenting opinion, while acknowledging that the public duty doctrine “is probably still followed in a majority of states,” Rollins at 1165, suggests that the court should “reconsider the continued

application of the public duty doctrine." Rollins at 1166. That position, however, was rejected by the 4-1 majority of the court.

The public duty doctrine is alive and well in Utah and the trial court properly applied the doctrine in its ruling on the City's motion to dismiss.

Sanders argues that there are recognized exceptions to the public duty doctrine. This is, however, not technically correct. As part of the public duty doctrine, a plaintiff may only maintain a negligence action if he can demonstrate a duty, independent from that owed to the public at large, on which to base the negligence claims. In Nelson, for example, the court held that the city had, by performing a function which it was not required to perform, independently created a tort duty to the plaintiff. Other cases require the existence of a special relationship which is sufficient to defeat the policy interest in applying the public duty doctrine. In other words, the issue is not whether Sanders can demonstrate that he falls within an "exception" to the public duty doctrine, but whether he can demonstrate a recognized duty owed to him independently of the duty owed to the general public, i.e., that the duty flowed to him as an individual "distinguishable from the mass." Higgins at 237.

Sanders also argues that the legislature, in enacting Utah Code Ann. § 10-9-1002, created a private remedy for individuals against government entities which precludes application of the public duty doctrine. While a creative argument, it has two

flaws, one of which is fatal. First, Sanders cites no authority for this argument. Second, and more importantly, § 10-9-1002 did not take effect until more than a year after Sanders initiated this action and nearly a year after the court entered its order for dismissal. A legislative enactment which affects vested rights cannot be applied retroactively unless there is a clear legislative expression of intent to do so. Cache County v. Property Tax Div., 922 P.2d 758, 767 (Utah 1996). There is no expression of legislative intent to make § 10-0-1002 retroactive. It is, therefore, irrelevant to the issue as decided by the trial court and before this Court on appeal.^{3/}

B. THE CITY OWED SANDERS NO SPECIFIC DUTY INDEPENDENT OF THAT OWED TO THE GENERAL PUBLIC.

The duty imposed on the City by state statutes and City ordinances is a duty owed to the general public. The "statutory duty to enforce the law"^{4/} is a duty owed the general public and not to Sanders independently from the public at large. Whether Sanders, as an individual, was arguably injured by a breach of this general duty has nothing to do with the threshold issue of whether the duty was one owed to him, as an individual, or to the general public.

^{3/} Aside from the fact that § 10-9-1002 doesn't apply, the Utah Supreme Court has rejected the argument that characterizing a claim as one for mandamus is sufficient to avoid compliance with statutory requirements for appeal. Crist v. Mapleton City, 497 P.2d 633, 634 (Utah 1972) ("A writ of mandamus is not a substitute for and cannot be used in civil proceedings to serve the purpose of appeal, certiorari, or writ of error.")

^{4/} Sanders' terms.

Despite Sanders' characterizations in his Appellate Brief, the only claims of duty identified by him in his complaint are of a general nature indicating statutory duties to the public at large:

39. That since the time the City of Draper has become aware of the conduct of Ovard which is contrary to state law and City of Draper ordinance, the City of Draper has ignored and continues to ignore those circumstances and has failed to enforce its laws and the laws of the State of Utah or has attempted to enforce those ordinances and laws in an ineffective manner.

40. That the City of Draper has a duty to police, manage and regulate the development of real property within its municipal borders and has utterly failed, in this case, in that duty.^{5/}

42. That, among other things, there is a duty on the part of the City of Draper, by way of enforcement of its ordinances and the laws of the State of Utah to prosecute violations of those laws and ordinances. ...

Complaint (R. 8) (emphasis added). Nowhere in his complaint did Sanders identify a duty which the City owed to him independent of the duties he alleged which were owed to the general public.

Apparently attempting to fall within the Higgins and Madsen narrow class provisions, Sanders argued before the trial court that (1) "there is an underlying intent to regulate the development and growth of a municipality behind these statutes which is designed to benefit all landowners in the city" and (2) "The Plaintiffs herein are certainly members of that particular

^{5/} The City disagrees that, as a matter of law, it had a duty to police and manage the development of property. For purposes of the motion to dismiss, this allegation has been treated as true although it is an erroneous conclusion of law.

class of persons which these ordinances were designed to benefit . . .” (R. 62) On its face, however, this is an argument that Sanders’ interests are identical to those of the general public. This certainly is not the “narrow class” distinguishable “from the mass” contemplated in Higgins.

Accepting the factual allegations of the complaint as true, the trial court properly applied the public duty doctrine and properly held that Sanders demonstrated no independent duty owed by the City to him. As a result, the dismissal of the claims against the City for lack of a duty was proper and should be affirmed.

POINT II

THE TRIAL COURT PROPERLY FOUND THAT SANDERS’ CLAIMS ARE BARRED BY THE RUNNING OF APPLICABLE STATUTES OF LIMITATIONS.

Sanders’ claims against the City are essentially of two types: (1) two claims that board of adjustment decisions were improper (the 1979 and 1988 variances) and (2) an “ongoing failure to abide by the law.” Appellant’s brief, p. 19. Neither claim has been made within the applicable statutory period.

Sanders’ claims related to the granting of variances fall within the express provisions of Utah Code Ann. § 10-9-15 (1953) which was the statute applicable to these claims at the time the causes of action arose. That section expressly provides for a thirty day period after the grant of the variances in which Sanders had to commence judicial action.

The city or any person aggrieved by any decision of the board of adjustment may have

and maintain a plenary action for relief therefrom in any court of competent jurisdiction; provided, petition for such relief is presented to the court within thirty days after filing of such decision in the office of the board.

Utah Code Ann. § 10-9-15 (emphasis added).

The statutory period had obviously long since run on the 1979 variance before Sanders acquired the property. He did, however, have the opportunity to take appropriate action if he considered the 1988 variance to have been improper. He did not do so until nearly two years after the variance was granted, well beyond the statutory thirty day period. As a result, Sanders' claims related to the board of adjustment grants of variances are barred as a matter of law.

Clearly, by the end of 1982 Sanders was aware of the problem, the injury and the alleged failure of the City. At that time, the last event necessary to assert the claims which Sanders makes against the City had occurred. In other words, the cause of action had accrued and the limitation period began to run.

Sanders did not commence his action against the City until nearly eight years after it had accrued, well beyond the statutory periods. Nor did he commence his claims arising from the board of adjustment actions within the statutorily required thirty day period. As a result, the trial court correctly ruled that his claims against the City were barred by the running of the applicable statutes of limitation.

POINT III

SANDERS' CLAIMS AGAINST THE CITY ARE BARRED BY THE GOVERNMENTAL IMMUNITY ACT.

Though the trial court did not base its motion to dismiss on the governmental immunity act, this issue was presented by the City in its memorandum discussion. R. 52-53). Because this issue was preserved before the trial court, it is appropriate for this Court to consider the issue. See Debry v. Noble, 889 P.2d 428, 444 (Utah 1995) ("It is well-settled that an appellate court may affirm a trial court's ruling on any proper grounds, even though the trial court relied on some other ground.")

The types of claims asserted by Sanders fall within the provisions of Utah Code Ann. § 63-30-10 (1953, as amended 1989), the statutes applicable at the time suit was initiated. Section 63-30-10(1)(a) provides immunity for discretionary functions. Investigation and prosecution of alleged ordinance violations are discretionary functions which are immune. Obray at 162. Section 63-30-10(1)(c) establishes immunity for alleged negligence in "the issuance, denial, suspension or revocation of or the failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order, or similar authorization." Claims based on these activities are barred because these activities "are essential governmental functions that must be free from tort liability." Gillman v. Dep't of Financial Inst., 782 P.2d 506, 512 (Utah 1989). Section 63-30-10(1)(d) provides immunity for failing to inspect property or by reason of making an inadequate or negligent inspection of property.

Sanders' claims of failure to investigate and prosecute, improperly granting or revoking variances, and failing to "properly police the development and subdivision" of property all fall within the scope of these areas of immunity. As a result, they are barred by the governmental immunity act.

CONCLUSION

The public duty doctrine clearly applies in Utah to tort claims against governmental entities to preclude liability to individuals based upon duties owed to the general public. Sanders has failed to state any duty owed to him independent of that owed to the general public and has, therefore, failed to state a duty on which his action can be based.

In addition, Sanders' claims are barred by the running of the appropriate statutes of limitation and by the governmental immunity act.

As a result, the holdings of the trial court are correct as a matter of law and should be affirmed.


DATED this 31st day of March, 1997.

WILLIAMS & HUNT

By Jody K. Burnett
Jody K. Burnett
Attorneys for the
Draper City Appellees

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of March, 1997, two (2) true and correct copies of the foregoing Brief of Draper City Appellees was mailed postage prepaid thereon, by first class mail in the United State Mail, to Reid W. Lambert, WOODBURY & KESLER, 265 East 100 South, #300, Salt Lake City, Utah 84111; and Bruce A. Maak, KIMBALL, PARR, WADDOUPS, BROWN & GEE, 185 South State Street #1300, Salt Lake City, Utah 84111.



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