

1977

# Harlow Vincent and Maxine Vincent v. Salt Lake County : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT  
STATE OF UTAH

HARLOW VINCENT and  
MAXINE VINCENT, his wife,

Plaintiffs and  
Respondents,

vs.

Case No. 15412-1

SALT LAKE COUNTY,

Defendant and  
Appellant.

RESPONDENTS' BRIEF

Reply to the appeal from the  
District Court of Salt Lake County  
The Honorable Hal G. Taylor, Judge

THOMAS A. DUFFIN  
CANNON & DUFFIN

Ten Broadway Building, Suite 510  
Salt Lake City, Utah 84101  
Attorneys for Plaintiffs and  
Respondents

SCOTT D. DUFFIN  
SNOW, JAMES  
700 Court  
Salt Lake City  
Attorneys for  
Appellant

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THOMAS A. DUFFIN  
CANNON & DUFFIN  
Ten Broadway Building, Suite 510  
Salt Lake City, Utah 84101  
Attorneys for Plaintiffs and  
Respondents

SCOTT DANIELS  
SNOW, CHRISTENSEN & MARTINEAU  
700 Continental Bank Building  
Salt Lake City, Utah 84101  
Attorneys for Defendant and  
Appellant

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IN THE SUPREME COURT

STATE OF UTAH

HARLOW VINCENT and  
MAXINE VINCENT, his wife,

Plaintiffs and Respondents,

vs.

SALT LAKE COUNTY,

Defendant and Appellant.

Case No. 15311

RESPONDENTS' BRIEF

NATURE OF THE CASE

This is an action for the undermining of the plaintiffs' garage and settling caused by a Salt Lake County storm drain.

DISPOSITION IN THE LOWER COURT

A jury trial resulted in a judgment for the plaintiffs in the amount of \$15,645.00 which was later amended by the court to the amount of \$17,583.47.

RELIEF SOUGHT ON APPEAL

The plaintiffs seek affirmation of the judgment and the judgment in its favor.

STATEMENT OF FACTS

Harlow Vincent purchased in 1957 Lot 38, Olympus Heights Subdivision. This lot is known as 4222 Coral Street in Salt Lake County, (about 4200 South and 2600 East in Holladay, Utah) (R 68). He commenced construction of a home for his wife and six children

in the fall and winter of 1959 and 1960. (R 69) The home faces east and the garage is on the south side of the lot. The creation of the subdivision of East Olympus Heights, approved by Salt lake County, did not create or reserve an easement for a storm drain. (Ex. 1, R 6) In 1958 with the creation of the streets in Olympus Cove, which is a large subdivision to the east of the plaintiffs' property, and the surface water created from the street and the inability of existing channels to contain the water, (R 40) Salt Lake County installed a storm drain from Olympus Cove west through the property later purchased by the plaintiffs and installed a pipe of about 24 to 30 inches in diameter without any right or easement of record that can be found. On some of the land outside of the subdivision, they did get easements (Ex. 5). The storm drain pipe is relatively dry and without water most of the time and is periodic in nature and usually only contains water when there is a rain storm or inclement weather in Olympus Cove and the Holladay area.

Harlow Vincent, on the purchase of his lot, knew that there was a storm drain by virtue of a collection grate on the south side of his lot. (R 69). He thought it was along the property line between himself and his neighbor to the south. The storm drain line was not discovered or uncovered at any time during the course of the construction of his home. (R 61) His garage is 10 feet from the property line.



In the first ten years no problem occurred, but after installing some cabinets in the garage in the fall of 1970, (R 71) and in the spring of 1971 he noticed some hairline cracks like putty drying out around the windows and doors in the garage and wondered if the weight of the cabinets had caused it. (R 71)

1972

In the spring of 1972, there was more cracking, but not serious, maybe an eighth of an inch over the doorways in the garage. (R 85) He then wondered if the storm drain might be clogged so he called Salt Lake County Flood Control and asked them to inspect it. They didn't call him or return his call, so he then called them again and they said "they had made an inspection and they had found no coincidence between that and the storm drain". (R 72)

1973

In the spring of 1973, the cracks were greater to the extent of one fourth to three eighths of an inch. He called Salt Lake County Flood Control again and again they did not call back, but upon Mr. Vincent calling them, they assured him "they could see no correlation between my problem and the storm drain". (R 73)

1974

In the last of May, 1974, he noticed additional slippage and talked to Ken Watson (R 73), Engineering Coordinator for Salt

Lake County Flood Control (R 22) and they again gave him "no satisfaction". (R 73) Up until June, 1974, there had only been cracks around the doors and windows of the garage and Lynn Jones, Contractor, thought that it was an inadequate footing that was causing the problem, when he saw it in the fall of 1973, and said that it could have been repaired for less than \$500.00 at that time. (R 123). Then during the months of June, July and August, 1974, the brick wall of the garage bowed, the beams began to twist, the roof sagged, mortar cracked out of the joints in the brick in the garage. He then hired Lynn Jones and excavated along the garage wall and observed the water coming in from the unsealed joints of the storm drain. (R 74) Then after discovery of the condition in July, 1974, he sent notice on August 30, 1974, to Salt Lake County (Ex. 42) All of the bowing of the brick walls, the roof sagging, the mortar cracking in the joints and the twisting of the beams and all but \$500.00 damage was done during the three month period prior to August 30, 1974. William Kaysworm, Superintendent of Salt Lake County Flood Control, during the period from 1961 to 1972, stated that Salt Lake County had been given notice of the problem at the Vincent home during the period of time that he was employed, and that he personally, and the Flood Control Commissioner in 1972 went to the Vincent residence. (R 101). He thereafter sent a crew out and grouted the joints. (R 101). Upon being asked what he told Vincent, he said "Well, we just told him that we didn't think that

it was our problem" \* \* \*. (R 103). He then said that the storm drain should not have been placed through the lot of the Vincent home (R 102) and that it had been poorly engineered. That from the time he had been employed by Salt Lake County from 1961 to 1972, he never installed pipe without sealing the joints. (R 99) (R 107). He also stated that grouting joints with concrete is not satisfactory and they will not as a rule hold. (R 99) That for years Salt Lake County has required rubber gaskets for installation of concrete storm pipes. (Ex. 2) Blaine W. Dalton, Pipe Contractor, with vast experience in the area since the 1920s stated that the standards for concrete pipe installation for 40 years have been the same, to install water-tight joints. (R 145) He further testified the pipe installed down the side of the Vincent home was poorly laid, not in line, (R 141) not sealed, and was leaking water, (R 142) even water was flowing under the pipe, (R 142) and that the pipe was filling with sand and dirt from the outside of the pipe. (R 144) Mr. Dalton said that the line would either have to be removed and replaced with proper rubber gasket pipe or would always continue to leak. He then explained how the problem had occurred in the Vincent home, in that the water over a long period of time, infiltrates in and out of the pipe carrying the soil outside of the pipe back in to the pipe as the water flow goes up and down within the line like a syphon. (R 146)

In September, 1974, Basil McGlochlin, Director of

Highways and Flood Control of Salt Lake County (R113), requested David Lovell, Engineer, to make a determination of the problem at the Vincent home. On September 10, 1974, his letter is as follows:

"Dear Mr. McGlochlin:

In response to your request concerning the foundation settlement of the residence owned by Mr. Harlow Vincent at 4220 Coral Street, we have made an on site investigation and it is our opinion that the settlement is a direct result of the leaking storm drain adjacent to the footings.

If we can provide additional assistance on the project, please contact us.

Very truly yours,

Dale R. Holt  
County Surveyor

DRH/DRL/js"

A copy of the letter is attached to this Brief. The initials DRH/DRL in signing the letter stand for David R. Lovell.

Don Glaittli stated that the same problem had occurred on his property one block to the west (R 54). Salt Lake County, at the time of the trial, denied that it was their storm drain until after the testimony of Rowland Smart, (R 39 ), Verion Smart (R 58 ), Boyd C. Bott, (R 20 ), and Don E. Glaittli (R 31 ). . They then stipulated that Salt Lake County had installed the said storm drain (R 61).

Lynn Jones stated that prior to the time of the bowing of the walls, that the home could have been repaired and that the

building would not have incurred additional damage if the water matter had been taken care of prior to the twisting of the beams, and the sagging of the roof which occurred in the months of June, July and August. The jury then found that it would take \$15,093.17 to correct the problems created by the leaking storm drain.

### ARGUMENT

#### POINT I

THE CLAIM IS NOT BARRED BY UTAH CODE ANNOTATED, §63-30-13, (1967).

Utah Code Annotated §63-30-13 provides:

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

The question of whether this action is barred by Utah Code Annotated, §63-30-13, (1967), was ruled on by four judges of the District Court on successive motions for summary judgment and during the course of trial: Judge James Sawaya ruled on it, (R 139); Judge Dean Conder ruled on it, (R 206); Judge Bryant H. Croft again had the problem during the settlement conference and Judge G. Hal Taylor had it during the course of the trial, (R 375). It was their opinion that since Salt Lake County had installed the storm drain, and that it was buried four or five feet in the ground, and there was no showing where Salt Lake County had an easement for its location so that it might be determined where it was, no question that it had not been discovered by the

plaintiff during the course of any construction during the building of his home, that the cause of action did not arise until discovery by the plaintiff.

The Supreme Court of Utah in the case of Christiansen v. Rees, 436 P.2d 435, stated as follows:

"(1) Therefore, we now hold that, regardless of prior pronouncements, where a foreign object is negligently left in the body of a patient during an operation and the patient is ignorant of the fact, and consequently of his right of action for malpractice, the cause of action does not accrue until the patient learned of the presence of such foreign object in his body . . .

It seems somewhat incongruous that an injured person must commence a malpractice action prior to the time he knew, or reasonably should have known, of his injury and right of action. It seems apparent that adherence to the 'majority rule' would penalize the conscientious doctor, who would advise his patient of a mistake, and protect a practitioner, who would not reveal his mistake until the statute of limitations became a shield."

Under the facts of this case, William Kaysworm, Flood Superintendent for Salt Lake County from the period of 1961 to 1972, stated that the rules and regulations required that all concrete storm drains have sealed joints. He further stated that the pipe in question was not sealed and was defective and he knew that the grout that he used at that time would not hold even though he sent men out on a fruitless mission to correct the problem. (R 101)

If the discovery rule in this case is not applied and the rationale of the Christiansen v. Rees case is not followed, would not be true that there would be one standard of care for doctors and

professional people and still another standard of care for public servants and their actions. This would mean that municipal bodies and public servants would incur no liabilities for their actions because the statute of limitations would commence to run regardless of their mistakes, representations. They could mislead home owners, such as Mr. Vincent, with impunity. Again, would not the rationale of the Christiansen v. Rees case, supra, in fact penalize the conscientious public servant who would advised the home owner of a mistake or problem on the installation of a storm sewer that perhaps could be leaking water under his foundation and shield those public servants who would not reveal their negligence until after the statute of limitations had become a shield.

As the case of Rosane v. Senger, 149 P.2d 372, Colo.1944, and the Supreme Court of Colorado so aptly stated:

"Certainly one should not be permitted to take advantage of his own wrong. Under the facts pleaded it was impossible for plaintiff to sue within the limitation and it is a recognized maxim that the law requires not impossibilities. A legal right to damage for an injury is property and one can not be deprived of his property without due process. There can be no due process unless the party deprived has his day in court and if without his fault his debtor conceals from his his right until a statute deprives him of his remedy he is deprived of due process. It is also an ancient maxim of the common law that 'Where there is a right, there is a remedy.' What a mockery to say to one, grievously wronged, 'certainly you had a remedy, but while your debtor concealed from you the fact that you had a right, the law stripped you of your remedy.'" (emphasis added)

## POINT II

THE ACTION IS NOT BARRED BY UTAH CODE ANNOTATED, §63-30-13, (1967) ON THE GROUNDS OF CONCEALMENT OF THE CAUSE OF ACTION AND FRAUD BY THE DEFENDANT.

In this case, Mr. Vincent noticed hairline cracks in 1972, and was assured by the public servants of Salt Lake County including the Flood Control Director for Salt Lake County, that it was not their problem and that it was no coincidence or correlation between the storm drain and his problem. (R 72) (R 73) (R 101) William Kaysworm also said that the installation was improper and that it would not hold and there was no dispute as to these facts and he freely admitted them. (R 99, 107, 103)

51 Am. Jur. 2d, Limitation of Actions, §147, states as the applicable law on the subject as follows:

"The general rule supported by the decisions in most jurisdictions is that the fraudulent concealment of a cause of action from the one to whom it belongs, by the one against whom it lies, constitutes an implied exception to the statute of limitations, postponing the commencement of the running of the statute until discovery or reasonable opportunity of discovery of the fact by the owner of the cause of action; under this rule, one who wrongfully conceals material facts and thereby prevents discovery of his wrong or the fact that a cause of action was accrued against him is not permitted to assert the state of limitations as a bar to an action against him, thus taking advantage of his own wrong, until the expiration of the full statutory period from the time when the facts were discovered or should with reasonable diligence have been discovered . . . ."

"The reasoning adopted in support of the general rule is that to hold that the statute of limitations



ran in favor of a person who had concealed the cause of action under such circumstances would be to permit the defendant to take advantage of his own wrong and to sustain a defense of which in good conscience he ought not to be permitted to avail himself. Since the delay of bringing the suit is due to the fraud of the defendant, the cause of action against him ought not to be considered as having accrued until the plaintiff could obtain the knowledge that he had a cause of action. It would be not only subversive of good morals but contrary to the plainest principles of justice to permit one practicing a fraud and then concealing it to plead the statute of limitations when, in fact, the injured party did not know of and could not with reasonable diligence have discovered the fraud. . ."

Our supreme court by previous announcement has also stated that even regardless of intentional fraud or concealment in the case of Attorney General of Utah v. Pomeroy et al., 73 P.2d 1277, at page 1300 as follows:

"There seems to be no doubt that if this were an action of fraud, the statute would not begin to run until the fraud was discovered or reasonably could have been discovered. But even when the action is not based on fraud, in equity where the cause of action is concealed from the one in whom it resides by the one against whom it lies, the statute will be postponed. In 37 C.J. 973 it is said that by the weight of authority the same rule applies in a case at law."

### POINT III

THIS CLAIM IS NOT BARRED BY UTAH CODE ANNOTATED, §63-30-13, (1967) ON THE GROUNDS THAT THE DEFENDANT, BY ITS CONDUCT, IS ESTOPPED TO CLAIM THE BENEFIT OF THE STATUTE AND ALSO WAIVED THE SAME.

Without repeating the facts as set forth in Point I and Point II, whether there was fraud and concealment and whether the

discovery rule applies, there was certainly waiver and estoppel against Salt Lake County as a matter of law. The Supreme Court of Utah pronounced itself in the case of Rice v. Granite School District, 23 Utah 2d, 22, 455 P.2d 159, where the supreme court says that a government entity is held to the same standard as a private individual:

"In Benner v. Industrial Acc. Comm., supra, 26 Cal.2d 349, 159, P.2d 24, 26, the court said: Where, as here, the delay in commencing action was induced by the conduct of the party sought to be charged the latter may not invoke such conduct to defeat recovery. An estoppel may arise although there was no designed fraud on the part of the person sought to be estopped. To create an equitable estoppel, it is enough if the party has been induced to refrain from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss . . . It is well settled that a person by his conduct may be estopped to rely upon these defenses. Where the delay in commencing action is induced by the conduct of the defendant it cannot be availed of by him as a defense . . . (emphasis added)

The court went on to say:

"Where the delay in commencing an action is induced by the conduct of the defendant, or his privies, or an insurance adjuster acting in his behalf, it cannot be availed of by any of them as a defense. One cannot justly or equity lull an adversary into a false sense of security thereby subjecting his claim to the bar of limitations, and then be heard to plead that very delay as a defense to the action when brought. Acts or conduct which wrongfully induce a party to believe an amicable adjustment of his claim will be made may create an estoppel against pleading the Statute of Limitations."

Under this point, there can be no question that as a matter of law, Salt Lake County, by and through its servants, mislead this

plaintiff in reference to his cause of action and their responsibility for damages. If there was a dispute that Bill Kayworm and the others had not stated what he indicated to the plaintiff, then there might be a question of fact under this point, but there is no question that Bill Kayworm told this plaintiff in reference to the problem that was occurring, and as to waylay him and mislead him when he was attempting to find out what the problem was.

#### POINT IV

THIS ACTION IS NOT BARRED BY UTAH CODE ANNOTATED, §63-30-13, (1967),

Utah Code Annotated, §63-30-13, (1967) provides:

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

Even admitting that the statute of limitations applies, even admitting that there was no fraud or concealment, even admitting that there was no estoppel or waiver, the plaintiff still could recover those damages which occurred within the 90 day period from the time that he filed his claim on August 30, 1974. (Ex. 42)

From the testimony of Mr. Vincent, there was only cracking around the doors and windows prior to June, 1974, and that the bowing of the walls, the roof sagging, the mortar cracking in the joints and the twisting of the beams all occurred after June, 1974. The plaintiff certainly could not have commenced

an action for those damages prior to that period of time because they had not occurred. Lynn Jones testified that those damages as he saw them were only \$500.00. (R 123) He further testified in his opinion that if the condition had been corrected, then nothing further would have occurred.

The case cited by the defendant, Power Farms, Inc. v. Consolidated Irr. Dist., 119 P.2d 717 (Cal. 1941), has really no application in that that case all of the damages were incurred at the one time. This case is more nearly applicable as to the statute of limitations problems in reference to nuisances. Blaine Dalton and all of the experts agree that the conditions of the water is such that it runs down the storm drain only at certain times of the year when there is rain or inclement weather in the Holladay area. All of the authorities agree that the pipe can be corrected by constantly grouting the pipe or installing new pipe with rubber gaskets. Therefore, the condition or the nuisance as to the leaking pipe is temporary and is not permanent. The authorities all hold that a leaking pipe such as we have in this case, is a nuisance. This is thoroughly discussed in 58 Am. Jur. 2d, Nuisances §132:

"As has been seen, a right of action for damages from a nuisance does not arise until some injury has been sustained, and it is generally agreed that the statute of limitations runs from the happening of the injury, the first right of action arises when the first injury is inflicted. Thus, where a structure, although permanent in its character, is not necessarily

and of itself a permanent and continuing nuisance, the statute begins to run against the cause of action therefor only from the time of its accrual, that is, from the time when the actual damage is occasioned.

The nature of a nuisance as permanent or temporary, which as has been seen is a question that frequently is difficult to determine, has an important bearing on the running of the statute of limitations. Where a nuisance is permanent in character, and its construction and continuance necessarily result in an injury, all damages are recoverable in only one action, and the statute commences to run from the completion of the structure or thing which constitutes or causes the nuisance. The fact that the nuisance continues does not make the cause of action a recurring one. The running of the statute is not prevented by the fact that the plaintiff failed to discover the permanent character of the injury, or its cause, in time to bring an action for damages.

On the other hand, when the injury is not complete, so that the damages can be measured in one action at the time of the creation of the nuisance, but depends upon its continuance and the uncertain operation of the seasons or of the forces set in motion by it, the statute will not begin to run until actual damage has resulted therefrom. Each repetition of a temporary or continuing nuisance gives rise to a new cause of action, and recovery may be had for damages accruing within the statutory period next preceding the commencement of the action although more than the statutory period has elapsed since the creation of the nuisance. Moreover, it has been held that the statute of limitations cannot be a complete bar in any case where the nuisance is of a continuing character and the resulting encroachment has progressively increased up to the time of commencing the action. . . ."

The leading case which cites most of the authorities holding that inadequate or leaky water storm drains are a nuisance and applying the basic law as applicable as to the temporary and permanent nuisance law, is the case of the City of Tucson v. Apache

Motors, 245 P.2d 255, where the Supreme Court of Arizona stated that where the City of Tucson constructed a water conduit which was not adequate in 1925 and in February 1931, and that there were successive floods and damages in 1940 and 1943, that the law was as follows:

" \* \* \* if a nuisance is of such a nature that although the thing itself may continue, yet its injury to another may be abated by human agency, and the owner or perpetrator of the nuisance fails to abate it, the nuisance is a continuing one, and one action does not exhaust the remedies of the parties injured. If, however, the thing is of such a character that it cannot be maintained without continuing to be, in the legal sense, a nuisance, it is permanent in its nature, and the rights of the injured party are exhausted by one action."

"(1-3) We believe the general rule to be that if a nuisance falls within the definition of a permanent nuisance ordinarily the cause of action arises immediately upon the creation of the nuisance and all damages past, present and future must be recovered in one cause of action and that the measure of damages to the realty is the difference between the market value of the premises immediately before and its market value immediately after the completion of the structure creating the nuisance. This is not always the rule, however, as will be hereinafter shown. On the other hand if the nuisance is temporary or continuing, a cause of action arises upon the occurrence of each successive injury sustained. Much confusion has arisen in the various jurisdictions of the United States as to just what constitutes a permanent nuisance as distinguished from a temporary or continuing nuisance so as to entitle the injured person to recover all damages sustained in one cause of action and what elements must concur to start the statute of limitations to running against the injured party. Perhaps it might be more accurate to say that the confusion arises more from an application of the facts in each case to the rule of law defining a permanent nuisance."

The Supreme Court of the State of Utah in the case of Ludlow et al. v. Colorado Animal By-Products Co., 137 P. 2d 347, again stated that in these type of actions that the trial court was not in error in holding that the statute of limitations was not applicable when they said:

"Furthermore, the trial court properly held that the nuisance was a recurring rather than a continuing one, and therefore very properly held that the statutes of limitations were inapplicable. Thackery v. Union Portland Cement Co., 64 Utah 437, 231 P. 813."

In this case what action for damages could have been brought in 1972 with two hairline cracks above the doorways if nothing more had occurred? What action could have been brought in 1973 which required nothing more than caulking and as early as May, 1974, not more than \$500.00 would have taken care of the problem. We certainly agree with the Supreme Court of Arizona and the prior announcements of the Utah Supreme Court that the nature of this action is a recurring one and that a cause of action arises each time that injury occurs. Therefore, even admitting all of the allegations prior to this time of the defendant, at the most it would only be \$500.00.



## POINT V

THE LEAKING STORM SEWER WAS NOT A "LATENT DEFECT".

The Utah Governmental Immunity Act waives governmental immunity for defects in public improvements in Utah Code Annotated, §63-30-9. That section also provides, however:

Immunity is not waived for latent defective conditions.

Black's Law Dictionary, Third Edition, defines latent defect as follows:

"A defect in an article sold, which is known to the seller, but not to the purchaser, and is not discoverable by mere observation. See *Hoe v. Sanborn*, 21 N.Y. 552, 78 Am. Dec. 163. A defect which reasonably careful inspection will not reveal. *Schaff v. Ellison* (Tex. Civ. App.) 255 S.W. 680, 682."

The question of latent defects and the interpretation of latent defects has been handled in many car and truck accidents and been interpreted in many insurance cases. All of the cases indicate that a latent defect is one that could not be discovered by reasonable means, and that if discovered it is no longer latent. In the case of *Arrow Transportation Company v. A. O. Smith Company*, a corporation, 454 P.2d 387, was an action by a trucking company against a manufacturer of the fifth wheel for indemnity for damages when the mechanism failed. The evidence also indicated that the trucking company had been forewarned by an engineering firm that the loads which the trucking company intended to subject the fifth wheel had caused fatigue factor. The Supreme Court of Washington said:



"(6) Without question, the Smithway fifth-wheel failure was caused by a 'fatigue fracture' of the vertical metal inner tube. However, this standing alone, does not establish a defect in manufacture. There is nothing in the record to indicate that the Smithway fifth-wheel departed, in any way, from the original design which caused the Engineers to inform Arrow of the inadequate safety factor in the Smithway to withstand their service loads. At best, the fifth-wheel was inadequately designed for Arrow's use, but the inadequacy was one about which Arrow had been fully informed. Furthermore, a 'fatigue failure' about which one is fully warned can hardly be classed as a latent defect. A latent defect is one which could not have been discovered by inspection. Hyde v. Bryant, 114 Ga. App. 535, 151 S.E.2d 925 (1966)." (emphasis added)

In the case of John W. Simmons Trucking Company, Inc. and John W. Simmons, v. Lester Briscoe, Okl., 373 P.2d 49, an Oklahoma case was where an automobile was struck in the rear by a truck whose brakes failed and the defense of the trucking company was that the failure was due to a latent defect. The Supreme Court of Oklahoma rapidly disposed of that argument by saying:

"There was nothing to show that a good mechanic could not have discovered any of the defects in the defendants' braking system on the truck."

In the case of Southwest Welding & Manufacturing Company v. The United States, 413 F.2d 1167 (1969), this was a case where the contractor was entitled to an equitable adjustment in the contract price for extra work in removing defects and the claim of the United States Government was that they were not because they were latent defects. The circuit court of appeals then stated:

"The stipulated facts above summarized illustrate conclusively that there was nothing latent about

these indications. They were readily discoverable upon any reasonable inspection prescribed by this contract or readily available. Moreover, they were at all times actually known to both parties, and the subject of discussion throughout the period that these sections were being inspected, passed, painted and installed in the concrete tunnels."

The case of Plaza Equities Corp v. Aetna Casualty and Surety Company, 372 F. Supp. 1325 (1974) was an insurance case where Aetna set forth a policy defense in its insurance contract that the damage was caused by a latent defect. The court then went on to say:

"A latent defect within the meaning of this policy exclusion is an imperfection in the materials used which could not be discovered by any known and customary test. . . . The Court has found that here the loss was caused by the misjudgment of the plaintiffs in not installing adequate supporting structures to carry the weight of the phoenix, not by any defect in the materials used nor in their installation. In any event, Employers' has not presented any evidence that this misjudgment could not have been discovered through the use of normal weight distribution and stress calculations. Therefore, the court finds that this exclusion does not apply in the present case."

In this case there was nothing latent about a leaky concrete pipe that was causing damage to plaintiffs' home. The defendant is not complaining, for example, that the cement in the pipe was inferior, etc. and that as a result it failed, which would be a classic example of a latent defective, but the facts in this case are just plainly that Salt Lake County negligently installed the original pipe, negligently failed to grout it, and

failed to correct it when it was brought to their attention. There cannot be a latent defect if the problem can be discovered by an ordinary inspection which, of course, any installer of pipe or expert would automatically know and it is submitted that the word "latent" means unknown and it cannot be unknown after it has been brought to their attention.

The rationale of the John W. Simmons Trucking v. Lester Briscoe, supra, Oklahoma case, where that court disposed of the latent defect argument by saying:

"There is nothing to show that a good mechanic could not have discovered any of the defects in the defendants braking system on the truck."

There is nothing to show that any good pipe mechanic in this case would not have discovered the defect. This type of situation was never intended to be covered by the legislature as an exclusion by Salt Lake County. As the Aetna Casualty and Surety case, supra, states:

"A latent defect within the meaning of this policy exclusion is an imperfection in the materials used which could not be discovered by any known and customary test."

#### ARGUMENT:

#### POINT VI

THE COURT DID NOT ERROR ON THE INSTRUCTIONS ON THE THEORY OF NUISANCE.

The trial court submitted the case on two theories to the jury as follows:

FIRST: The case of whether the defendant was negligent and whether the negligence was the proximate cause of the plaintiffs' injuries. (R 354) Under the theory of negligence and an examination of instructions 10, (R 354) and instruction 11, (R355) it is very apparent that the instructions are proper as to negligence and were properly submitted to the jury.

SECOND: The second theory was whether the defendant had created the nuisance and that the nuisance was the cause of the plaintiffs' damage.

The court in Instruction 13 (R 357) defined a nuisance as follows:

"You are instructed that a nuisance is anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property."

An examination of 58 Am. Jur. 2d, Nuisances, §1 under definitions and the authority cited, the court very closely followed the general law of Am. Jur., supra, which states a nuisance as follows:

"A nuisance has variously been defined to be that which unlawfully annoys or does damage to another, anything that works an injury, harm, or prejudice to an individual or the public, anything that works hurt, inconvenience, or damage, anything which annoys or disturbs one in the free use, possession, or enjoyment of his property or which renders its ordinary use or physical occupation uncomfortable, and anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights. There are numerous other similar definitions in the text-books and reports, and there are statutory definitions in some states."

The court then went on to say in Instruction No. 9 (R 353):

"The party upon whom the burden of proof rests must sustain it by a preponderance of the evidence. The law does not permit you to base a verdict on speculation or conjecture as to the cause of the incident in question. If the evidence does not preponderate in favor of the party making the charge of negligence or nuisance, then he has failed to fulfill his burden of proof and your finding must be against that party on that issue. In other words, if after considering all of the evidence, it should appear to you just as probable that the defendant was not negligent as that he was or that his negligence, if any, was not a proximate cause of the incident as that it was such a proximate cause or if after consideration of all of the evidence it should appear to you just as probable that the defendant did not create or maintain a nuisance as that it did or that the nuisance, if any, was not a proximate cause of the incident as that it was such a proximate cause, then a case has not been established against him by a preponderance of the evidence as the law requires and he cannot be held liable."

The court then went on pursuant to Instruction No. 14, (R 358) as follows:

"A nuisance is a condition, not an act or failure to act on the part of the person responsible for the condition. If the wrongful condition exists, and the person charges therewith is responsible for its existence, he is liable for the resulting damages to others although he may have used the highest possible degree of care to prevent or minimize the deleterious effects. Recovery in an action for a nuisance cannot be defeated by showing that there was no negligence on the part of the defendant.

"A Nuisance does not rest on the degree of care used, for that presents a question of negligence, but on the degree of danger existing even with the best of care, the question of care or want of care is not involved. Thus, a person who creates or maintains a nuisance is liable for the resulting injury to others, without regard to the degree of care or skill exercised by him to avoid the injury, and notwithstanding that he exercises reasonable or ordinary care and skill, or

even the highest possible degree of care.

"A nuisance may or may not be based in the negligent act of the one creating it. However, it frequently is the consequence of negligence, or the same acts or omissions which constitute negligence which may give rise to a nuisance. A lawful action may become a nuisance by reason of its negligence performance."

Therefore, in order to hold the defendant liable under the theory of negligence, first of all the jury had to find that a nuisance had been created by the preponderance of the evidence, and that the elements that were in the definition had not been complied with and that the maintenance of that nuisance might or might not be a result of negligence, but that the condition was a proximate cause of damage to the plaintiffs' property. 58 Am. Jur. 2d, Nuisances, §3, provides as follows:

"'Negligence' and 'nuisance' are not synonymous terms. They are distinct torts, and are different in their nature and consequences. As subsequently is observed, negligence is not a necessary ingredient of a nuisance.

To render a person liable on the theory of either nuisance or negligence there must be some breach of duty on his part, but liability for negligence is based on a want of proper care, while ordinarily, a person who creates or maintains a nuisance is liable for the resulting injury to others regardless of the degree of care or skill exercised to avoid the injury. The creation or maintenance of a nuisance is a violation of an absolute duty, the doing of an act which is wrongful in itself, whereas negligence is a violation of a relative duty, the failure to use the degree of care required under particular circumstances in connection with an act or omission which is not of itself wrongful. Nuisance is a condition and not an act or failure to act, so that if a wrongful condition exists, the person responsible for its existence is liable for resulting damage to others. It has been held that



where the damage is the necessary consequence of what the defendant is doing, or is incident to the business itself or the manner in which it is conducted, the law of negligence has no application, and the law of nuisance applies. However, these torts may be, and frequently are, coexisting and practically inseparable, as where acts or omissions constituting negligence also give rise to a nuisance, and it is difficult at times to distinguish between actions of nuisance and those bottomed on negligence. . . ."

The Supreme Court of North Dakota in the case of Kinnischtzke v. Glenn Ullin, 79 ND 495, 57 NW2d 588, said:

"Negligence may or may not result in the creation of a nuisance, and, on the other hand, a nuisance may be created wholly without negligence."

In this case, the defendant, since 1972, when it attempted to repair the leaking pipeline knew of its condition and allowed that condition to exist from that time even to the present. It is submitted that a leaky storm sewer which seeps water and undermines the foundation of the plaintiffs' home continually is a nuisance and a wrongful act within itself; and to continue to maintain that wrongful act makes Salt Lake County liable for the damages and consequences of the condition which it allowed to exist. This would be the same as a chemical plant knowing that it was emitting acid from its smoke stacks onto the cars of the general public and then not be responsible for its actions. The restatement of torts as cited by the defendant seems to indicate that it turns on whether it is intentional or unreasonable. How can it be said that under that definition that a matter of law in this case Salt Lake County's conduct was not that of being intentional and unreasonable.

## CONCLUSION

Don Glaittli, (R 54) stated that within three years after the installation of the storm drain in 1958 that the same problem was being created a block to the west on his property and Salt Lake County was there correcting the same problem relative to the failure to seal the joints. Then with all of that knowledge in 1972 and thereafter, Salt Lake County continued to make representations, mislead and waylay the plaintiffs who were attempting only to find what was causing the problem that was undermining their garage foundation. Now Salt Lake County seeks to plead and claim the benefit of a Statute of Limitations and apply the same regardless of their actions, conduct or responsibility. It is submitted that to fail to uphold the verdict of the jury, and the judgment of the District Court and the trial judge who reviewed the entire matter, would be to apply a non-responsible standard to public servants and uphold their conduct, and apply a Statute of Limitations if the period of time runs out before a person can file an action and discover the implications of their actions.

It is also submitted that Salt Lake County, by its actions, has been guilty of fraud, concealment and also should be estopped to claim the Statute of Limitations under the doctrine of Rice v. Granite School District, supra. It is also apparent that they have maintained a nuisance in allowing water to infiltrate from their concrete storm drain to flow under the foundation of the plaintiffs' garage and undermine the same. It is also submitted

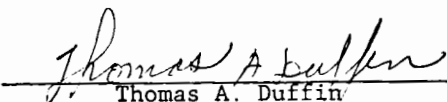


that the nature of the action is temporary and a continuing nuisance which can be abated by proper construction which should have been installed in the first instance or corrected at a later date or even now. The general law as set forth in the arguments that since the nuisance is one of a temporary and continuing nature, that each cause of action arose each time the damage occurred and each spring and summer when the flood waters came down the storm drain. Although it is submitted that all of the other arguments apply, even perchance if they should not, the most the defendants would be entitled to is to \$500.00 reduction in reference to the total amount of the judgment.

The attached letter, written by David Lovell, certainly sets forth the culpable responsibility of Salt Lake County and it is submitted that they should respond to the damages which the jury has found in the case.

Respectfully submitted this 25 day of January, 1978.

CANNON & DUFFIN

  
\_\_\_\_\_  
Thomas A. Duffin  
Attorney for Plaintiffs  
and Respondents  
Ten Broadway Building, Suite 510  
Salt Lake City, Utah 84101

MAIN OFFICE  
Bldg. No. 1, Room 400  
2033 South State Street

FIELD OFFICE  
Bldg. 8, 2033 South State Street

OFFICE OF SURVEYOR  
September 10, 1974



RECEIVED

SEP 11 1974

SALT LAKE COUNTY  
DEPARTMENT OF HIGHWAY  
AND FLOOD CONTROL

Mr. Basil McGlochlin, Director  
Department of Highway and Flood Control  
Midvale, Utah

Dear Mr. McGlochlin:

In response to your request concerning the foundation settlement of the residence owned by Mr. Harlow Vincent at 4220 Coral Street, we have made an on site investigation and it is our opinion that the settlement is a direct result of the leaking storm drain adjacent to the footings.

If we can provide additional assistance on the project, please contact us.

Very truly yours,

*DALE R. HOLT by DRL*

DALE R. HOLT  
County Surveyor

DRH/DRL/js

I hereby certify that I mailed two copies of the foregoing brief to Scott Daniels, Snow, Christensen & Martineau, attorneys for Defendant, 700 Continental Bank Building, Salt Lake City, Utah 84101, postage prepaid, this \_\_\_\_\_ day of January, 1978.

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