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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

HARLOW VINCENT and MAXINE VINCENT, his wife, Plaintiffs and Respondents,	:	
vs.	:	CASE NO. 15311
SALT LAKE COUNTY, Defendant and Appellant.	:	

APPELLANT'S BRIEF

Appeal from the Judgment
of the District Court of Salt Lake County
The Honorable Hal G. Taylor, Judge

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CASES CITED

STATUTES

UTAH CODE ANNOTATED

AUTHORITIES

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NATURE OF THE CASE

This is an action for settling damage to a garage, allegedly 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

Defendant seeks reversal of the judgment and judgment in its favor as a matter of law, or that failing, a new trial.

STATEMENT OF FACTS

In about 1957 Salt Lake County installed a storm drainage system across real property known as the East Olympus Heights Subdivision. In 1958, the plaintiffs purchased a building lot in the subdivision. In the winter of 1959-60 a house was constructed upon the lot. The plaintiff was aware of the existence of the storm drain and its general location along the south of his property, but didn't know exactly where it ran. (Record 69).

For the first ten years that plaintiffs lived in the house they had no problem with foundation settling. (Record 70). In the spring of 1971, however, plaintiff noticed some small cracks in his garage. They did not appear critical, so he ignored them. (Record 71).

In the spring of 1972 plaintiff noticed that the cracks had widened. He wondered if the cracking could have something to do with the county storm drain, so he called Salt Lake County Flood Control. A few days later he called again and was told that an inspection had been made and that no correlation could be found between the cracks and the storm drain. (Record 72).

In the spring of 1973 the cracks had further widened. The plaintiff again called Salt Lake County. Again, Salt Lake County inspected and could find no correlation between

the plaintiffs' problem and the storm drain. (Record 73).

In the spring of 1974 plaintiff noticed even wider cracking in his garage. In addition, the door became more difficult to operate. In May of 1974 plaintiff again talked to Salt Lake County personnel, but "received no satisfaction." (Record 73).

Throughout the summer of 1974 plaintiff kept a close eye on the settling problem. He consulted with an expert who thought the problem was probably inadequate footings. In August of 1974 plaintiff hired a contractor to dig along the side of his garage to check the footings. The contractor found the ground around the footings to be wet. Further investigation revealed that the storm drain was leaking.

On August 30, 1974 plaintiff gave written notice to Salt Lake County. Plaintiff then brought this action on the theories of nuisance and negligence.

ARGUMENT

POINT ONE. THIS CLAIM IS BARRED BY UTAH CODE ANNOTATED §63-30-13 (1967).

Utah Code Ann. §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;

A cause of action arises the moment all of the elements of the cause of action are present. In a negligence case the elements are:

1. a duty,

2. a breach of the duty (negligence),

3. proximate cause, and

4. actual damage.

Prosser, Law of Torts (4th Ed. 1971) §30 at 143.

This Court held in O'Hair v. Kouvalis, 23 Utah 2d 355, 356, 463 P.2d 799, 800 (1970):

> A cause of action or right of action arises the moment an action may be maintained to enforce it, and the statute of limitations is then set in motion.

In the case at bench all the elements of the cause of action existed in the spring of 1971 when the cracking first appeared.

A case very similar to this one is Power Farms, Inc. v. Consolidated Irr. Dist., 119 P.2d 717 (Cal. 1941). In that case damage to real property had occurred as a result of a leaking canal. The plaintiff had failed to file its claim with the irrigation district within the time fixed by the claim statute. In reversing a judgment for the plaintiff the court held:

> Damage such as that caused by seepage, it is said, can occur so slowly that the injury would not be discovered before the statutory period lapsed. The answer to this argument lies in the fact that the claim provision as a whole indicates no intention that it is to have a limited application, for the opening clause includes within its scope any claim for damage or injury to property resulting from "any" dangerous or defective condition brought about by the district in the operation of its works. Where the time and extent of injury are

> uncertain, a statutory period of limitation begins to run when the fact that damage is occurring becomes apparent and discoverable, even though the extent of the damage may still be unknown. (Emphasis added).

119 P.2d at 721.

In the present case the elements of the cause of action all existed in the spring of 1971; the plaintiff discovered damage at that time; the notice was not filed until August 30, 1974, long after the 90 statute applicable to governmental entities had lapsed.

This Court held as early as 1883 that a statute of limitations is not tolled by the plaintiff's ignorance of his cause of action except in cases of fraud or concealment. In Dee v. Hyland, 3 Utah 308, 3 P.388 (1883), the plaintiff's horse disappeared. More than three years later the plaintiff saw the horse in the possession of the defendant. The defendant had purchased the horse shortly after the time when the horse disappeared. In affirming a judgment for the defendant, the court said:

> Where there is no proof of fraud on the part of the defendant, the general rule is that the time of limitations runs from the time of the commission of the wrongful act, or the right of action accrues, and not from the time of the knowledge of the act by the plaintiff, there being no proof of any wrongful conduct on the part of the defendant by means of which that knowledge is concealed from the plaintiff.

3 Utah at 314, 3 P. at 389-90.

This rule was reaffirmed by this court as recently as

1974 in the case of Smoot v. Hydro Flame Corp., 522 P.2d 709 (1974). That case involved the sale of securities sixteen years prior to the action. Justice Henroid, speaking for the unanimous court held:

> [P]laintiff claims its decedent had no knowledge of such transfer and hence the statute of limitations would not start to run until discovery, and knowledge thereof.
>
> The facts belie and defeat such an argument. No fraud is alleged or shown. Nothing is reflected to indicate low blows, hidden microphones, smoke-filled rooms or deception.

522 P.2d at 710.

The legislature has modified this rule, by statute, in cases of fraud, mistake, taking or injuring of personal property, and medical malpractice to allow the statute to be tolled until the cause of action is discovered. Utah Code Ann. §78-12-26 (1977); Utah Code Ann. §78-14-4 (1977).

Some jurisdictions have also adopted this "discovery rule" by judicial decree.

Many courts, including the Utah Supreme Court, have adopted the discovery rule in the narrow fact situation involving medical malpractice cases where a foreign object is left in a patient's body. Christiansen v. Rees, 20 Utah 2d 199, 436 P.2d 435 (1968). The reason most courts have given for adopting this narrow exception is that the problems of proof are minimized in foreign object cases since foreign objects do not normally find their way into people's bodies

except in surgery. Secondly, in this type of malpractice case the fact that damage is occurring is generally inherently unknowable. See e.g., Fernardi v. Strully, 173 A.2d 277, 286 (N.J. 1961); Billings v. Sisters of Mercy, 389 P.2d 224, 281 (Ida. 1964).

Some courts have extended this discovery rule to other types of medical malpractice, and a few have extended it to all types of professional malpractice on the theory that a person of ordinary education is not capable of knowing malpractice when it has occurred and may, therefore, be excused from filing his suit until he discovers the malpractice. For example in Peters v. Simmons, 552 P.2d 1053, 1055 (Wash. 1976) the Washington Supreme Court held that the discovery rule applied to legal malpractice for the following reason:

> The primary resaon for extending and applying the rule is because the consumer of professional services frequently does not have the means or ability to discovery professional malpractice.

The Washington Court has, nevertheless, retained the traditional rule in ordinary tort cases. Messes v. Shannon, 397 P.2d 846 (Wash. 1964).

Similarly, in Neal v. Magna, Olney, Levy, Cathcart, & Gelfand, 491 P.2d 421 (Cal. 1971) the California court adopted the discovery rule as applied to legal malpractice but specifically stated:

> In ordinary tort and contract actions, the statute of limitations, it is true, begins to run upon the occurrence of the last element essential to the cause of action. The plaintiff's ignorance of the cause of action, or of the identity of the wrongdoer, does not toll the statute. (Emphasis added.)

491 P.2d at 428.

In Carlson v. Ray Geophysical Division, 481 P.2d 327 (Mont. 1971), the Montana Court held:

> [T]he fact that a person entitled to an action has no knowledge of his right to sue, or of the facts out of which his right arises, does not, as a general rule, prevent the running of the statute, or postpone the commencement of the period of limitation, until he discovers the facts or learns of his right thereunder.

481 P.2d at 329.

Certainly, any time that a plaintiff is foreclosed from suing due to a statute of limitations, he may claim that an injustice has resulted. The legislature has balanced this danger, however, against the possible injustice that may result from stale and fraudulent claims that are difficult to defend against.

Furthermore, if the discovery rule should be applied to any statute of limitations, it should not be applied to the Governmental Immunity Act. Most statutes of limitation cut off a right existing at common law because of the passage of time. Conversely, the Governmental Immunity Act creates a right, not existing at common law, upon certain conditions. This court held in Scarborough v. Granite School District,

531 P.2d 480, 482 (Utah 1975):

> The School District is a political subdivision of the State. Therefore, it would normally be immune from suit; and the right to sue is an exception created by statute. We have consistently held that where a cause of action is based upon a statute, full compliance with its requirements is a condition precedent to the right to maintain a suit.

The legislature balanced the possible injustice of barring legitimate claims against the needs of governmental entities and enacted a statute which creates a right of action if a claim is filed within 90 days after the cause of action arises. The legislature created no exception. None should be created by this court.

POINT TWO. EVEN UNDER THE "DISCOVERY RULE" THIS CASE MUST BE REVERSED.

If this court were to extend the discovery rule to ordinary nuisance actions, this verdict still could not stand. The discovery rule as usually stated is that the limitations period does not begin to run until the plaintiff discovered or should have discovered that he had a cause of action.

Here the plaintiff discovered damage in 1971. He suspected that the county drain was the cause in 1972. He became even more suspicious in 1973. He did not dig along his foundation until the summer of 1974.

Surely the issue of "should have discovered" is, at best, a jury issue. The trial court refused to submit this

issue to the jury. This alone would require a reversal.

POINT THREE. THE LEAKING STORM SEWER WAS A "LATENT DEFECT."

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

> Immunity is not waived for latent defective conditions.

This court has never interpreted this provision of the Act.

This provision of Utah law is also apparently unique among tort claims acts, and there are no cases from other jurisdictions providing guidance. In other contexts some courts define latent conditions as those which are "not discoverable by reasonable inspection." Other courts hold that a latent defect is one which is discoverable by proper inspection but is not superficially discernible or plainly apparent to the eye. Owensby v. Jones, 136 S.E.2d 451, 456 (Ga. App. 1964).

Webster defines latent as:

> lying hidden and undeveloped within a person or thing, as a quality or power, as yet concealed; unrevealed.

Webster's New Twentieth Century Dictionary (2d ed. 1957).

Salt Lake County's position is that the legislature, in preserving immunity for latent defective conditions, had in mind situations exactly like that found in the present case.

The storm drain was in operation 14 years before any problem arose (from 1957 to 1971). Even then it was over three years later when any connection between the damage and the drain was made.

In Salt Lake County and throughout the State, there are hundreds of miles of storm drains. Some are new, modern construction; others are old. Many, like the one in this case, have functioned adequately for many years but may begin leaking. Some can be inspected by crawling through them, although this may not disclose leaks. Others are too small for a man to enter. The only way that Salt Lake County could avoid possible liability is to dig up and replace all the old storm drains in the county at horrendous expense. Because of the duration of a governmental entity's existence, and because of the continual turnover in managing personnel, the legislature provided that latent defects would remain in the area of governmental immunity.

No better example of a latent defective condition could be found than a buried storm drain, which operates perfectly satisfactorily for 14 years and then begins to cause damage by slowly seeping water underground.

The plaintiffs contend that they should be excused from filing a notice of claim from 1971 when the damage began until 1974. If they are excused, it is only because the defect was latent and, therefore, not reasonably discoverable.

If the defect was latent, the claim is barred; if it was not latent, the time for discovery should not be tolled.

POINT FOUR. THE COURT ERRED IN SUBMITTING THIS CASE ON THE THEORY OF STRICT LIABILITY.

The trial court instructed the jury 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. (Emphasis added).

This instruction to the effect that negligence is not required in a nuisance is totally misleading to the jury and clearly erroneous under Utah law.

This court established the law of nuisance for water damage in the case of Sanford v. University of Utah, 26 Utah 2d 285, 488 P.2d 741 (1971). In that case this court cited Dean Prosser for the proposition:

> Any of three types of conduct may result in liability for a private nuisance. By far the greater number of such nuisances are intentional.
>
> . . .
>
> Today liability for nuisance may rest upon an intentional invasion of the plaintiff's interests, or a negligent one, or conduct which is abnormal and out of place in its surroundings, and so falls fairly within the principle of strict liability.

26 Utah 2d at 291-92, 488 P.2d at 745 citing Prosser, Law of Torts (3d Ed.), Sec. 88, pp. 594-595.

The court also cited the Restatement of Torts as to this issue. The Restatement provides:

> §822. General Rule.
>
> The actor is liable in an action for damages for a non-trespassory invasion of another's interest in the private use and enjoyment of land if,
>
> (a) the other has property rights and privileges in respect to the use or enjoyment interfered with; and
>
> (b) the invasion is substantial; and
>
> (c) the actor's conduct is a legal cause of the invasion; and
>
> (d) the invasion is either
>
> (i) intentional and unreasonable; or

(ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless or ultrahazardous conduct. (Emphasis added.)

In clarifying this rule, the Restatement comments says:

> There is no general rule of law that one acts at his peril in respect to interferences with another's use or enjoyment of his land, and, therefore, when such interferences are purely accidental, the actor is not liable for causing them. It is only when unintentional invasions are caused by another's conduct which is negligent, reckless or ultrahazardous that the law subjects the actor to liability.

Restatement of Torts, §822, comment at 233 (1939).

Defendant could have been found liable to plaintiffs, therefore:

(1) If the harm was intentional or the activity undertaken with knowledge that damage was substantially certain to follow, and the invasion was unreasonable. Or,

(2) If the conduct of Salt Lake County was negligent. Or,

(3) If the activity was of such a nature as to fall fairly within the area of strict liability.

The issue of strict liability was discussed by this court in the case of Stevens v. Wong, 123 Utah 309, 259 P.2d 586 (1953). There the plaintiff had occupied the lower portion of a building. The defendant occupied the space directly above. The defendant's water pipe sprung a leak, water seeped into the plaintiff's ceiling causing large portions of plaster to fall.

The plaintiffs contended that strict liability should apply. This court rejected that contention, holding that strict liability applied only to activities which are so hazardous that damage is likely to occur, no matter how careful the actor may be.

The court distinguished a California case which applied strict liability to the drilling of an oil well in the following language:

> That case involved the drilling of an oil well near a residence and the drillers knew or should have known that no matter how careful they were in their operations that damage might ensue from the very nature of the matter they were dealing with. The experience of mankind has not taught this to be true of water in pipes.

123 Utah at 314, 259 P.2d at 588.

Similarly, the "experience of mankind" has not taught that the operation of a storm drain is likely to cause damage.

CONCLUSION

In adopting the Governmental Immunity Act, the legislature created a right of action which did not exist at common law. It did so provided certain conditions were met and procedures were followed by the claimant. One of these conditions is that a claim be filed within 90 days after the cause of action arises.

It is clear that a cause of action arises or begins to exist the moment all four elements of the cause (duty,

negligence, proximate cause and damage) are present. In this case all the elements were present in the spring of 1971. The notice was filed in the late summer of 1974.

The Legislature balanced the rights of injured persons against the needs of governmental entities and wrote a statute without a provision for tolling until the cause of damage is discovered. It is the Court's duty to implement that statute; not to write a new one of its own.

As a California court held in Fidelity and Deposit Co. v. Claude Fisher Co., 327 P.2d 78 (Cal.App. 1958):

> Statutes of limitation and the like, prescribing definite periods of time within which actions may be brought or certain steps taken are, of necessity, adamant rather than flexible in nature. Such statutes are upheld and enforced regardless of personal hardship, and they are favored by the courts.

cited with approval, Roosendaal Const. & Min. Corp. v. Holman, 28 Utah 2d 396, 503 P.2d 446 (1972).

Even if it were properly within the court's domain to adopt a "discovery rule", it should not be adopted in cases such as this. The purposes of a prompt notice may not outweigh the burden put upon plaintiffs in a case where a surgeon leaves a foreign object in a patient's body. There the lack of problems of proof and the inherent difficulty in discovering the malpractice may outweigh the need to bar old claims. Perhaps this Court should go as far as the California court and adopt the discovery rule for all professional

malpractice. But certainly the rule should not be adopted in ordinary negligence cases.

Even if the discovery rule is adopted for defective structure cases, it can only apply to latent defects, since patent defects are readily discoverable by diligence. The Legislature has not seen fit to waive governmental immunity for latent defects.

Third, even if the discovery rule were applied in this case, the issue of when the defect "should have been discovered" should have gone to the jury.

Last, the law is clear that this is not a proper case for the application of strict liability.

Defendants request a reversal.

Respectfully submitted this 27 day of December, 1977.

SNOW, CHRISTENSEN & MARTINEAU

By Scott Daniels
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Mailed two copies of the foregoing Appellant's Brief to Thomas A. Duffin, Attorney at Law, 510 Ten Broadway Building, Salt Lake City, Utah 84101, postage prepaid, this 28 day of December, 1971.

/s/