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Harlow Vincent and Maxine Vincent v. Salt Lake County : Appellant's Reply Brief

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.

SALT LAKE COUNTY,

Defendant and
Appellant.

APPELLANT'S PETITION

Appeal from the
of the District Court of
The Honorable Sal

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HARLOW VINCENT and
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Case No. 15311

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APPELLANT'S REPLY BRIEF

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

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APPELLANT'S REPLY BRIEF

PRELIMINARY STATEMENT

Respondent's Brief raises two new issues. These are the issue of estoppel and waiver (treated in Point III of Respondent's Brief); and whether the plaintiff can recover for the damages sustained within 90 days previous to the filing of his claim under the Utah Governmental Immunity Act (as treated in Point IV of the Respondent's Brief).

This Reply Brief treats only these new issues.

ARGUMENT

POINT ONE. SALT LAKE COUNTY IS NOT
ESTOPPED TO ASSERT THE PROVISIONS OF
THE UTAH GOVERNMENTAL IMMUNITY ACT.

This Court has considered the issue of estoppel for the governmental entity to assert as a defense the provisions of the Utah Governmental Immunity Act on four occasions. These cases, taken together, clearly define the law on the issue of estoppel. The first of the cases decided was Rice v. Granite School District, 23 Utah 2d 22, 456 P.2d 159 (1969). In that case plaintiff was injured when she fell from a wooden bleacher which was maintained by the defendant school district. Immediately following her accident she filed a notice of claim with the authorities of the high school. Shortly thereafter, she was contacted by the school district's insurance adjuster, who advised her that she would be compensated for her damages as soon as the costs thereof were ascertained and she was released by her doctor. During the next several months she was again contacted by the insurance adjuster, who reassured her that the insurance company would accept responsibility.

Finally, after the time for filing suit had expired, the insurance company informed the plaintiff that her claim had been denied. Under these facts this Court reversed a Summary Judgment on behalf of the school district and held that there was a genuine issue of material fact as to whether

the school district should be estopped from asserting the provisions of the Utah Governmental Immunity Act. So holding, the court said:

One cannot justly or equitably 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.

23 Utah 2d at 28, 456 P.2d at 163.

The second of these cases is Varoz v. Sevey, 29 Utah 2d 158, 506 P.2d 436 (1973). In that case the plaintiff's decedent was killed in an automobile accident which allegedly resulted from inadequate warning signs. Shortly after the accident, the plaintiff's attorney contacted Salt Lake County and was erroneously told that the section of the road in question was maintained by the Utah State Highway Department. Acting on this information, the plaintiff's attorney filed a notice of claim with the State of Utah. After the claim was denied by the State of Utah on the basis that the section of road was actually maintained by Salt Lake County, the plaintiff's attorney filed notice of claim with Salt Lake County, but by that time the 90 day period for filing had expired. The trial court granted a motion to dismiss and this court affirmed, holding that the legislature intended to make the filing of a timely notice of claim prerequisite to maintaining an action against a governmental entity. The

court also impliedly held that there was no waiver or estoppel to assert the provisions of the Governmental Immunity Act in that case.

In Whitaker v. Salt Lake City, 522 P.2d 1252 (Utah 1974), the plaintiff was injured in a cave-in on a hillside adjacent to a park owned and maintained by Salt Lake City. In this case, like Rice, the notice of claim was filed within the prescribed time, but the plaintiff's attorney failed to file the suit because the city's attorney had assured him that there would be a settlement within the policy limits and thereby lulled him into believing that no suit need be filed. This court held that these allegations created a sufficient question of fact to require submission of the estoppel issue to the jury.

The final case in this series is Scarborough v. Granite School District, 531 P.2d 480 (Utah 1975). In Scarborough, the minor plaintiff was injured on a school ground as a result of dead electrical wires which had been left dangling from the poles. The principal was immediately informed of the child's injury and the child's parent had a discussion with the school principal about the responsibility for the accident. The school principal erroneously told the plaintiff's mother that the wires had been left in the dangling condition by the utility company, Utah Power & Light.

In reliance on the information obtained from the school

principal, the plaintiff pursued her claim against Utah Power & Light rather than the school district. By the time the plaintiff's attorney discovered that school district employees, rather than Utah Power & Light, left the wires dangling the time for filing a notice of claim with the school district had expired. The court discussed the Rice case and held as follows:

There are significant differences between this case and that one. There the plaintiff had filed a timely written notice with the school district. The plaintiff's contention was that the insurance adjuster, who was handling the matter for the school district, gave the plaintiff assurances that the case would be settled after the extent of injuries and damages had been determined, and that this lulled her into a sense of security until after the time for filing the suit had expired.

. . .

[I]t is our conclusion that the trial court could properly rule as a matter of law that because of the plaintiff's failure to file a claim in the time allowed by the statute; and because there is no basis upon which estoppel against the defendant's reliance on the statute could be made out, she cannot show entitlement to maintain this action.

These four cases, taken together, clearly establish the elements of estoppel under the Utah Governmental Immunity Act. In both Rice and Whitaker, where the court held that there was a dismissible issue on the question of estoppel, the plaintiff had filed the timely notice with a governmental entity but had failed to file the action within the limitation period thereafter. In both Rice and Whitaker, the

plaintiff claimed that a representative of the governmental entity had promised that payment would be forthcoming and thereby lulled the plaintiff into a false sense of security and a belief that filing a lawsuit would not be necessary.

In Varoz and Scarborough, where the court held that there was not a submissible issue of fact on the issue of estoppel, the plaintiff had failed to act because of false information that it had been supplied by representatives of the governmental entity. But in neither of these cases did the governmental entity admit liability or tell the plaintiff that payment would be forthcoming.

When a potential defendant denies liability for whatever reason, the plaintiff is put on notice that the defendant intends to make no payment. The plaintiff knows at that point that legal action must be taken. In such an instance no estoppel can arise. Of course, if the defendant is guilty of fraud or concealment, the time period is tolled until discovery of the fraud or concealment. For an estoppel to occur, however, the defendant must lull the plaintiff into a false sense of security by promising payment or admitting liability.

In this case the evidence is not that Salt Lake County admitted liability and promised to pay, but that it disclaimed liability. At that point, according to the Utah cases, the plaintiff is made aware that in order to proceed

further, a formal claim must be made against the governmental entity.

POINT II. PLAINTIFF CANNOT RECOVER FOR
THE DAMAGES OCCURRING IN THE 90 DAYS
PREVIOUS TO THE FILING OF CLAIM.

This Court has previously considered the issue of the running of the statute of limitations for continuing torts or nuisances. Johnson v. Utah-Idaho Central RR., 68 Utah 309, 249 P. 1036 (1926) was a case very similar to the one at bench in that a continuing nuisance was alleged. The railroad had built its tracks near the plaintiff's property, causing depreciation to the value of the property. The plaintiff claimed that the statute of limitations did not run against a continuous nuisance. The court held:

Where the wrong done by the railroad company is temporary in its nature, as in leaving cars unnecessarily on its tracks, or while engaged in the work of laying down its track, something existing today and not tomorrow, fluctuating in extent and depending on the ever-repeated action of the company, only such damages as have fully accrued prior to the commencement of the suit are recoverable, and none based upon any presumed continuance or repetition of the wrong. But where the wrong is of a permanent nature and springs from the manner in which the track, as fully completed, affects approach to the lot, then, notwithstanding the right which the State retains to control the manner of use of the highway or a railroad company, even if deemed necessary to compel an entire removal of its track, the lot owner may treat the act of the company as a permanent appropriation of the right of access to his lot, and recover as damages the consequent depreciation in value of the lot.

Consequently, the court affirmed a directed verdict in favor of the defendant. This rule accords the general rule followed throughout the United States as exemplified in the case of Power Farms, Inc. v. Consolidated Irrigation District, 119 P.2d 717 (Cal. 1941). The Respondent's Brief makes assertion that this case related to an injury that occurred at one time. The facts of the case clearly indicate, however, that this was a case involving property damage which had occurred through water seeping over a 2-year period.

This rule also accords with the rule stated in 54 C.J.S., Limitations of Actions, §173:

Ordinarily limitations as to a cause of action for damages caused by percolation or seepage of water or oil run from the date of the injury for which suit is brought or from the date on which injury becomes apparent or discoverable by due diligence.

Most significant, however, is the fact that this case was not tried upon the theory that the plaintiff could only recover damages which had occurred in the 90 days previous to the filing of the claim. Since the trial court ruled that the claim need not be filed until the cause of the damages was discovered and that the cause of the damages was not discovered, as a matter of law, until August of 1974, no evidence was presented as to what amount of damages occurred during this period. Mr. Lynn Jones, who visited the property a year earlier, testified that the damage that he could see

at that time could be repaired for \$500 (Record, 123). He did not see the property any time in the 90 days previous to the filing of the notice of claim, however. Even at the time he did view the property and make the estimate of \$500 to caulk the cracks, he did not make an inspection in the drainage pipe or under the foundation to determine whether such erosion had taken place, that further supporting work needed to be done at that time. Because the ruling of the trial court made similar evidence irrelevant, no rebuttal to Mr. Jones' estimate was presented. Furthermore, no evidence was presented as to whether the nuisance was continuous or reoccurring. The plaintiff asserts in his brief that "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 rainstorm or inclement weather in Olympus Cove in the Holladay area." This is not supported by evidence, however, because there was no reason to establish this fact at the trial.

If the court should find that the plaintiff is entitled to recover for the damages that accrued within the 90-day period previous to the filing of the claim, these issues would have to be resubmitted to a jury.

CONCLUSION

If the plaintiff can produce evidence that Salt Lake County was guilty of concealment or misrepresentation which

was the cause of plaintiff's failure to file his notice of claim under the Utah Governmental Immunity Act, then Salt Lake County is clearly barred from asserting this defense. No such evidence was presented at trial, however.

Conversely, there is no issue which can be legitimately submitted to a jury as to whether Salt Lake County is estopped to assert the provisions of the Utah Governmental Immunity Act.

The Utah case law, and the case law in the United States generally, holds that the cause of action runs from the time the damage has occurred and the claim is totally barred after the statutory period expires. Even if this Court were to hold, however, that the plaintiff could recover for the damages which occurred in the 90 days previous to the filing of the claim, there is no evidence, at this point, on which the court could make a determination as to how much damages had occurred.

Respectfully submitted this 13 day of February, 1978.

SNOW, CHRISTENSEN & MARTINEAU

By Scott Daniels
Scott Daniels

MAILING CERTIFICATE

Mailed two copies of the foregoing Appellant's
Reply Brief to Thomas A. Duffin, Attorney at Law, 510
Ten Broadway Building, Salt Lake City, Utah 84101,
postage prepaid, this 21 day of February, 1978.

Scott Daniel