

2001

R.D. Andrus v. State of Utah, Department of Highways, Salt Lake County, Gibbons & Reed Co. : Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

R. D. ANDRUS, et al.,
Plaintiffs-Appellants,

vs.

STATE OF UTAH and its DEPARTMENT
OF HIGHWAYS, SALT LAKE COUNTY, a
political subdivision of the State
of Utah, and GIBBONS & REED CO.,
a Utah corporation,

Defendants-Appellees.

ROBERT J. CAMERON,

Plaintiff-Appellant,

vs.

J. P. GIBBONS, d/b/a GIBBONS &
REED CONSTRUCTION COMPANY, the
STATE OF UTAH, a sovereign, and
the COUNTY OF SALT LAKE,

Defendants-Appellees.

RICHARD GROTEPAS,

Plaintiff-Appellant,

vs.

J. P. GIBBONS, d/b/a GIBBONS &
REED CONSTRUCTION COMPANY, and the
STATE OF UTAH, a sovereign,

Defendants-Appellees.

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Case No.

13716

FILED

OCT 21 1975

Clerk, Supreme Court, Utah

PLAINTIFF-APPELLANTS' PETITION FOR REHEARING

AND SUPPORTING BRIEF

Continued from front cover

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PETITION FOR

REHEARING

Civil No. 13716

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES
OF THE SUPREME COURT OF THE STATE OF UTAH.

The Plaintiffs-Appellants present this Petition for a Rehearing of the above case, and in support thereof, respectfully show:

1. That the appeal in the case was argued before this Court on May 13, 1975;

2. On September 5, 1975, this Court rendered its decision in favor of Salt Lake County and Gibbons & Reed Construction Company, Defendants and Respondents, affirming the action of the District Court, entering judgment in favor of the Defendant-Respondents, Salt Lake County, and Gibbons & Reed Company, but contrary to the special verdicts of the Jury. Judgment against the State of Utah in favor of Plaintiff was also affirmed.

3. The Plaintiffs-Appellants timely seek a rehearing pursuant to Rule 76(e) upon the following grounds:

(a) The issue of inverse condemnation as raised by appellants was not resolved by the Court and was discussed only in the dissenting opinion.

(b) Other issues before the Court were not fully understood and resolved.

(c) Material facts ascertained and decided by the Jury were overlooked, misstated and misconstrued, clearly affecting the result in the case.

(d) Incorrect principles of law were applied or correct principles of law were improperly applied, clearly

affecting the result in this case.

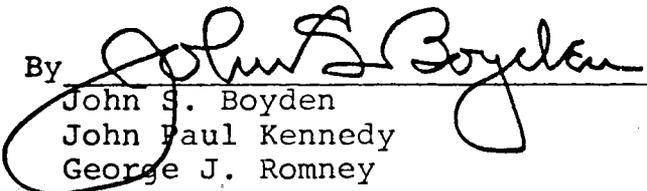
For the foregoing reasons, it is urged that this Petition be granted.

DATED this 20th day of October, 1975.

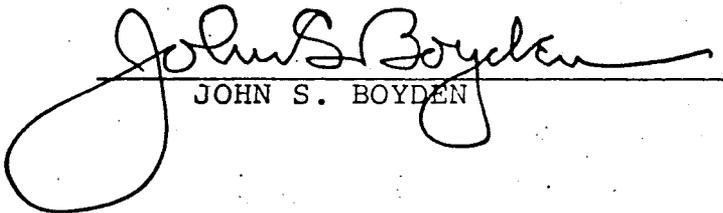
Respectfully submitted,

BOYDEN, KENNEDY, ROMNEY & HOWARD

By


John S. Boyden
John Paul Kennedy
George J. Romney

I hereby certify that the foregoing Petition is submitted in good faith and not for purposes of delay.


JOHN S. BOYDEN

IN THE SUPREME COURT OF THE STATE OF UTAH

R. D. ANDRUS, et al.,

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Defendants-Appellees.

PLAINTIFF-APPELLANTS'

BRIEF IN SUPPORT

OF PETITION FOR

REHEARING

Civil No. 13716

THIS BRIEF, is submitted under Rule 76(e) of the Utah Rules of Civil Procedure and in this typewritten form, pursuant to leave granted by this Court on October 16, 1975.

NATURE OF THIS CASE

This matter involves three consolidated actions for damages against the State of Utah, Salt Lake County, and Gibbons & Reed Construction Company, based on flooding damage which occurred in two storms, during a state highway construction project. By order of the Court [R.59], and pursuant to Rule 42(b), the issue of liability was tried separately, reserving for later proceedings, the question of damages.

DISPOSITION IN LOWER COURT AND IN THE SUPREME COURT ON APPEAL

The Trial Court entered judgment against the State of Utah and in favor of Plaintiffs. This judgment was affirmed by the Supreme Court. Defendants do not seek a rehearing on this part of the judgment. However, the extent of the State's liability is involved in a constitutional inverse condemnation question.

The Inverse Condemnation Count IV of Plaintiffs' complaint, was dismissed before trial [R.27]. For the purpose of fully protecting their rights on appeal, Plaintiffs appealed from the order of dismissal. This Court granted a motion of Defendants-Respondents to dismiss the appeal.

Provided, however, that this shall not prejudice the right of the Plaintiff-Appellant, to challenge the ruling herein appealed from if a later appeal is filed from subsequent final rulings in this case. [R.47]

On subsequent appeal, the Plaintiffs urged that their property had been taken and damaged in violation of the Utah and Federal Constitutions [App.Br. 37]. The majority of this Court did not discuss or render an opinion on Plaintiffs Point III (Inverse Condemnation). The dissenting opinion dealt solely with this issue.

On the question of effective denial of Plaintiffs' right to a jury trial, as provided by the Constitution and laws of this state, the disposition of the case was as follows:

A special verdict was returned by the Jury upon Interrogatories submitted to it. Matters pertinent to Plaintiffs-Appellants Petition for Rehearing, were found by the Jury upon special Interrogatories submitted to it. The Jury found that Salt Lake County unreasonably created a defective or dangerous condition in the utilization of its storm drain system and that all Plaintiffs, except Richard Grotepas who had not sued the County, were damaged as a proximate result. [R.723-24] In addition, the Jury found that Salt Lake County was negligent in failing to provide reasonably adequate drainage facilities for the highway project and that Plaintiffs suffered damage as a proximate result thereof. [R.728] Finally, the Jury found that Gibbons & Reed Construction Company was negligent in failing to take reasonable precautions to protect the project during construction and that this negligence proximately caused damage to Plaintiffs. [R.728] An amended Order and Judgment was entered on May 15, 1974, under which the Court ruled that the County of Salt Lake

and the Gibbons & Reed Construction Company were not liable for any damages suffered by the Plaintiffs. The judgment of the District Court was affirmed by the Supreme Court.

NATURE OF RELIEF SOUGHT

The Plaintiffs-Appellants now seek a rehearing on the question of Inverse Condemnation, and on matters pertaining to the effective denial of a jury trial regarding liability of Salt Lake County and Gibbons & Reed Construction Company.

STATEMENT OF FACTS

The Plaintiffs in this action are all homeowners residing in an area immediately west of Wasatch Boulevard near 4500 South in Salt Lake County [Ex.6(p)]. This general area is located on the base slopes of Mount Olympus, which rises sharply from the valley floor as part of the Wasatch front. [Ex.1(p)] The Defendant, Gibbons & Reed Construction Company, was a contractor with the State of Utah, for construction of the highway project in question. [R.1775-1777, Ex.6(p)] The facts concerning the flood and its damage to Plaintiffs, are adequately set out in the majority opinion of this Court and in Plaintiffs-Appellants Brief on Appeal. The disposition of this case in the Trial Court and in the Supreme Court on Appeal, also constitute the facts forming a basis for the present Petition for Rehearing. Since these facts are specified under a previous heading, it can serve no useful purpose to reiterate them at this point.

ARGUMENT

A. Inverse Condemnation

Article I, Section 22, of the Constitution of Utah, provides:

Private property shall not be taken or damaged for public use without just compensation.

Amendment V, of the Constitution of the United States of America, provides:

. . .; nor shall private property be taken for public use, without just compensation.

The Federal Constitution does not refer to damage but since the taking of "private property" includes personal property⁽¹⁾ the effect of the two constitutional provisions is identical for the purposes of the case at bar as to the personal property taken.⁽²⁾ Plaintiffs further contend that there was a taking of real property for a period of time sufficient to bring the

(1) Monongahela Nav. Co. v. U.S. 148 U.S. 312, 37 L.Ed. 345 (1893)
Armstrong v. U.S. 364 U.S. 40, 4 L.Ed. 2d 1554 (1960)
Causby v. U.S. 75 F.Supp. 262, 109 Ct.Cl. 768 (1948)
(Compensation for personal property destroyed by flooding)
Patrick v. Riley 209 Cal. 350, 287 P.455 (1930)
State v. Leeson 323 P.2d 692, 697 (1958)
Anderson Cattle Co. v. Kansas Turnpike Authority 308 P.2d 172, 176, 180 Kan. 749 (1957). See also, Van Alstyne, Statutory Modification of Inverse Condemnation: The Scope of Legislative Power 19 Stan.L.R. 727 at 739 Note 50.

(2) The position of plaintiffs on this issue is to be distinguished from State Road Commission v. Brown 531 P.2d 1294 (Utah) (1975). The Utah Eminent domain statute refers to real property but neither the State nor the Federal Constitution make such a distinction.

case within the protection of the Federal Constitution, but that question does not arise under the State Constitution, which explicitly covers damage.

The fifth amendment to the United States Constitution was originally a limitation only upon the powers of the Federal Government.⁽³⁾ But, with the adoption of the Fourteenth Amendment, its provision for just compensation for private property taken for public use became fully operative as a restriction upon the powers of the several states and their political subdivisions as a substantive aspect of the due process of law which the states are required to extend to all persons within their jurisdiction.⁽⁴⁾

The majority opinion in this case made no reference whatever to Point III, The State and County Should Be Held Liable In This Case Under the Doctrine of "Inverse Condemnation", in Plaintiffs' Brief. [Plaintiffs' Brief Pg. 34-39].

The Supreme Court did not have the opportunity to evaluate the dissenting opinion, which was filed 32 days after the majority opinion was filed. This fact alone constitutes a substantial

(3) Barron v. Mayor and City Council 32 U.S. (7 Peter) 243 (1883).

(4) Griggs v. Allegheny County 369 U.S. 84, 90, (1962).
Chicago B & Q.R.R. v. Chicago 166 U.S. 226 (1897).
See, also, Van Alstyne, Supra. at P.730; Calif. Water & Tel. Co. v. Railroad Commission 19 F.Supp. 11, 12 (1937).

reason for granting a rehearing. In the event the learned dissenting opinion of Judge Bullock has caused the Court to wonder whether it should at this time give further consideration to the great weight of authority on this fundamental proposition, we urge the Court to also reexamine the reasons expressed in Plaintiffs' Brief at Pages 37-39.

In harmony with Judge Wade's dissenting opinion in Fairclough vs. Salt Lake County, 10 Utah 2d, 417, 354 P.2d 105 (1960), many states have judicially expressed the view, that private property shall not be taken for public purposes without just compensation as a matter of constitutional requirement without effectuating legislation. (5)

In a very recent case, the Supreme Court of New Mexico has ruled that the common law doctrine of sovereign immunity is no longer a valid defense in tort suits against the State or its political subdivisions. New Mexico thus becomes the 12th state to judicially put an end to a state's immunity for tort liability. (Hicks v. New Mexico 9/26/75)

The court explains that the original justification for the doctrine--that the sovereign can do no wrong--is a 'feudalistic contention' that is no longer valid. Moreover, eliminating the state's immunity will not result in an intolerable financial burden since adequate insurance can be secured to eliminate possible liability. Placing the financial burden upon the state, which is

(5) See footnote 6 to dissenting opinion in case at bar.

able to distribute the losses throughout the populace, is more just and equitable than forcing an injured individual to bear the entire burden alone. There are no longer any conditions or circumstances that could rationally support the doctrine, the court concludes, and its continued validity has been the cause of a 'great degree of injustice.' (Page 2159)

It is interesting to observe that the New Mexico Supreme Court argument urging placing the financial burden upon the State as more equitable than forcing an injured individual to bear the entire burden alone, is the same argument Plaintiffs have urged in support of the doctrine of inverse condemnation. (Plaintiffs' Brief Paragraph IV, Pg. 38).

The Utah Legislature in 1965, recognized the injustice of sovereign immunity in this field by the passage of the Act under which this Court affirmed the judgment against the State in this case, ⁽⁶⁾ but the limitation on the amount of recovery is arbitrary and unjust. The legislature, having waived sovereign immunity, this Court is not bound by a legislative provision which attempts to illegally amend the Constitutions of Utah and the United States to allow private property to be taken or damaged for public use without just compensation above \$50,000.00 for all the property that may be damaged on one occasion. Interpretation of the Constitution is not a legislative matter. That function is reserved to the judicial branch. This Court has the

(6) 7A U.C.A. 63-30)

solemn responsibility to protect the citizens of this State and their property as the Courts of most other states have done.

One additional element in this case that should not be overlooked is the fact that the damage to Plaintiffs' property is not simply the result of an incident connected with, or flowing from the public project. The jury found:

The highway project of the State of Utah including the storm drain system, was unreasonably defective or dangerous.

Plaintiffs, should be afforded the right not to be deprived of their property above the statutory limitation without due process of law, particularly, when such damage is the result of the negligence of the sovereign.

If sovereign immunity had not been waived in this State, the force of judicial consensus on the proposition that the constitutional provision concerning the taking of private property for public use is self-executing, now requires a fresh look under present circumstances. As Judge Bullock so profoundly states, "the proper inquiry is whether the clear right granted by the Constitution has been abrogated or denied by the legislation." Is stare decisis of this Court so essential and the private property of individual citizens injured by the neglect of the sovereign so expendable as to prevent this Court from breathing life into the clear meaning of the Constitution? The Plaintiffs in the case at bar furnish this Court with an opportunity to respond to the clarion call for justice and equity in a field where Utah finds itself increasingly lonesome. Progressive thought bears

the fruits of sound development. It would be refreshing if 1975 marked the confluence of the flow of Utah protective justice for its citizens into the mainstream of constitutional fulfillment. We conclude with the words of the well-known commercial "eventually, why not now?"

B. Trial By Jury

Article 1, Section 10 of the Constitution of Utah provides:

In capital cases, the right of trial by jury shall remain inviolent. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction, a jury shall consist of four jurors. In criminal cases, the verdict shall be unanimous. In civil cases, 3/4ths of the jurors may find a verdict. A jury of civil cases shall be waived unless demanded. [Emphasis added].

In this case, the jury by unanimous verdict found that the flood of August 17, 1969, injured the property of the Plaintiffs as a proximate result of an unreasonably created defective or dangerous condition, created by Salt Lake County in the utilization of its storm drain system [Finding B(1)] and [R.723]. The jury further found that Salt Lake County was negligent in failing to provide reasonably adequate drainage facilities for the highway project [Finding I][R.728].

The jury further found, that the Contractor, Gibbons & Reed Construction Company, was negligent in that it failed to take reasonable precaution to protect the project during construction and that this negligence, proximately caused damage

to Plaintiffs [Finding J(1) & K][R.728].

The Trial Court declined to enter judgment against Salt Lake County and Gibbons & Reed Construction Company.

Upon appeal, the Plaintiffs contended, that since the special verdict against both Salt Lake County and Gibbons & Reed Construction Company was supported by substantial evidence, refusal of the District Court to enter a judgment thereon, in effect, denied the Plaintiffs of their right to a jury trial [Plaintiff-Respondents' Brief 27]. This Court affirmed the judgment with respect to Salt Lake County and Gibbons & Reed Construction Company.

Taking or damaging property of another by negligent acts is so clearly an action at common law as not to require citations. The statutes⁽⁷⁾ and Civil Rules of Procedure⁽⁸⁾ of this State protect the right of jury trial in harmony with the State Constitution. Here, a jury made a decision on substantial evidence as indicated in Plaintiffs' Brief on Appeal at Pages 20 through the first half of Page 34. This Court did not attempt to disguise its holding in First Security Bank of Utah N.A. v. Ezra C. Lundahl, Inc., 22 Utah 2d, 433, 454 P.2d, 886, 889 (1969):

But when a party has demanded a trial by jury he is entitled to have the jury find the facts, and it is not the trial court's prerogative to make findings inconsistent therewith and thereby defeat the effect of the jury's findings.

(7) 9 U.C.A. 78-21-1.

(8) Rules 38, 39.

The Court now states:

We find no statutory duty on the part of the County to supply drainage facilities for the State Highway Project.

After discussing the evidence in a limited manner, the Court further states:

The County, by giving its permission, to the State to empty the highway drainage system into the County sewer, would not create liability on the part of the County for the acts of the State or its contractor in failing to provide safeguards to prevent obstruction of the sewer system, nor was the County responsible for the action of the State in emptying a large conduit into the County's smaller conduit. In our review of the record, we find no foundation for the assessment of liability upon the County.

Plaintiffs concede that the County had no statutory or other duty to supply drainage facilities for the State Highway Project. But, when it consented to participate in that project, it acquired a duty as a party in the project, to refrain from committing the sewer system to the unreasonable creation of a defective or dangerous condition. The jury so determined.

[R.723-24] The opinion of this Court makes no reference to this finding but states only the subordinate finding; "Salt Lake County was negligent in failing to provide reasonable adequate drainage facilities for the highway project". Salt Lake County participated in the creation of a dangerous and defective condition and then failed to provide reasonably adequate drainage facilities for the highway project, which it had agreed to

furnish. It should not escape the liability for its action which proximately caused damage to the blameless citizens in the endangered area.

Plaintiffs' position appears to have not been fully understood or resolved. The material fact found by the jury on the participation of Salt Lake County in the creation of a defective and dangerous condition was overlooked or misconstrued. The judiciary should not deny any litigant the right of trial by jury in a case appropriate to such a mode of trial.

In dealing with the claim of Plaintiffs against Gibbons & Reed, this Court simply stated the findings of the jury and concluded with the statement:

. . . , we find no basis upon which to find that the contractor was liable to the Plaintiffs.

Cases cited in support of this conclusion, do not reach the point raised by Plaintiffs. Those cases all support the general proposition that a contractor is not liable if he has merely carried out plans, specifications and directions given him, at least when plans are not so obviously dangerous that no reasonable man would follow them. This was the holding of the Utah Supreme Court in Leininger v. Stearns - Roger Manufacturing Company. 17 Utah 2d 37, 41, 404 P.2d 33, 36. But that same case at Page 41, of the Utah Report, and Page 36 of the Pacific Report stated:

However, each case must be decided on the basis of its own facts and seldom are two cases identical.

In the Leininger case, the employment contracts specified that the contractor would have no responsibility for the adequacy of the equipment furnished by the employer and the suit was with reference to an exhaust fan that had been installed for the employer according to the directions of the manufacturer. In the case at bar, the contractor, by contract with the State, was responsible for damage "on account of or in consequence of any neglect, in safeguarding the work". By the same contract, Gibbons & Reed Construction Company agreed to be responsible "for all damage or injury to property of any character, during the prosecution of the work, resulting from any action, omission, neglect or misconduct in his manner or method of execution of the work".

The jury found Gibbons & Reed was negligent in failing to take reasonable precaution to protect the project during construction, and that such negligence proximately caused damage to Plaintiffs.

Plaintiffs are not contending that Gibbons & Reed is responsible for damage to property due to design failure or failure to follow plans and specifications. The contractor was negligent in failing to protect the project during construction in matters for which it was contractually responsible, and in matters within its own discretion. The evidence is overwhelming that the contractor knew of the flooding danger (Plaintiffs' Brief Pg.31). The State did

not purport to instruct the contractor when to remove the protective barrier from Wasatch Boulevard or when to line the barrow pits or when to protect the inlets to the storm sewer. These were matters within the discretion of Gibbons & Reed. Expert testimony revealed that it would not be good practice to leave the lead drains, which fed into a closed drain, unprotected during construction, that a clog-free drain cover could be used and, "ditchriders" could be used to insure that the intakes remained unobstructed (Plaintiffs' Brief PP.32, 33). The employer hired no ditchrider, but left the project without such protection during the storm in question. The order of construction of protective measures was its responsibility. This is substantial evidence to support the jury's finding of negligence. The Court has merely cited the evidence of things done right by the contractor. The weighing of the evidence is for the jury when the evidence is substantial.

The case of Marian Municipal Water District v. Penninsula Paving Company, 94 P.2d 404 (Cal.) expressed the general rule as above-stated, but held at Page 406:

. . . but where the contractor departs from the contract, plans, or specifications, or goes beyond them, or performs the work specified in an improper, careless, or negligent manner, which results in injury to adjacent property, then he is responsible in damages for the tort he has committed. [Emphasis added].

In the case we now consider, the contractor specifically contracted to assume all damage resulting from failure to protect the project during construction.

Wood v. Foster & Creighton 235 S.W. 2d 1, (Tenn.) states:

It is a well-settled rule in this state that a contractor constructing a public improvement for a public authority is not liable to a private property owner for the resulting damage where the contractor acts in accordance with the public authority's orders and is not itself guilty of negligence in the manner in which it does the work.

[Page 3].

Southwest Construction Company, Inc., v. Ellis, 342 S.W.

2d 485, 488 (Ark.) quotes other cases but specifically recognizes that when a contractor is guilty of negligence or willful tort, he is responsible for his damages. Here the contractor was negligent in failing to protect the project during construction and such negligence resulted in damage to the Plaintiffs. If the law of this state protects a contractor from liability for his own negligence, committed in violation of his contract, simply because he otherwise follows plans and specifications, the decision of this court should so specify with certainty.

The statement by the Court:

Gibbons & Reed having performed its contract with the State in accordance with the plans, specifications, and directions given it by the State with a reasonable degree of skill, we find no basis upon which to find that the contractor was liable to the plaintiffs.

does not satisfy this requirement. We believe the Court has failed to consider the particular question presented by the appeal and has disposed of the liability of Gibbons & Reed Construction Company upon generalities which are admitted by Plaintiffs.

CONCLUSION

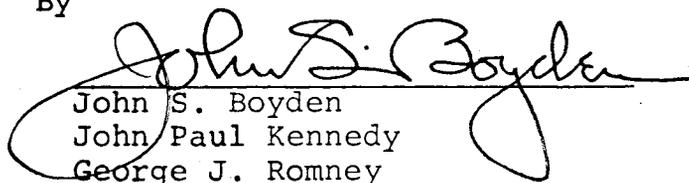
The issue of inverse condemnation, as raised by appellants, was not resolved by the Court. Material facts ascertained and decided by the jury were overlooked or disregarded, and the issues raised were not fully understood and resolved. A rehearing should be granted.

DATED this 21st day of October, 1975.

Respectfully submitted,

BOYDEN, KENNEDY, ROMNEY & HOWARD

By


John S. Boyden
John Paul Kennedy
George J. Romney

CERTIFICATE OF SERVICE

I hereby certify, that copies of the foregoing Petition for Rehearing and Supporting Brief were served upon the individuals named below, by mailing two copies to each of said individuals, by first class mail, this 21st day of October, 1975.

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