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R.D. Andrus v. The State of Utah : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

R. D. ANDRUS, VIRGINIA M. ANDRUS, JAN D. BATES, ANN K. BATES, LLOYD N. BECKSTEAD, JUNE H. BECKSTEAD, JESSE N. BENSON, ESTELLA D. BENSON, BRUCE R. BOWTHORPE, MARILYN R. BOWTHORPE, ROBERT P. CARLISLE, NORMA DEAN CARLISLE, ARTHUR CHILD, EDITH C. CHILD, CHARLES F. CONTANT, AGNES A. CONTANT, GENE V. CRAWFORD, SHERRY T. CRAWFORD, GARY A. FLANDRO, CHERI P. FLANDRO, IRWIN C. GLASER, FRAYDELL Z. GLASER, THOMAS E. HAGERMAN, JOYCE L. HAGERMAN, KEITH H. HARDY, ANNETTE H. HARDY, RONALD C. JONES, JOHANNA JONES, F. SCOTT KIRK, PEARL B. KIRK, CLYDE B. KIRKHAM, ERMA KIRKHAM, ROBERT P. KUNKEL, FRANCES KUNKEL, EUGENE C. LLOYD, LAURIE LLOYD, BARNARD J. McENTEE, ELIZABETH C. McENTEE, WILLIAM J. MERBACK, GLORIA D. MERBACK, HEBER C. PETERSON, CAROLYN T. PETERSON, ELEANOR E. PRADO, EDWIN A. READ, JOY E. READ, CECIL O. SAMUELSON, JANET M. SAMUELSON, NISHAN H. SHERANIAN, MARILYNN J. SHERANIAN, FARRELL M. SMITH, SANDRA R. SMITH, ANGUS K. SPROUL, LOIS B. SPROUL, FRANK M. STEINHARDT, EVA STEINHARDT, RICHARD R. TWELVES, VIRGINIA HALE TWELVES, SHIRL J. VARTY, RAMONA VARTY, J. ROBERT WELCH, DOROTHY K. WELCH, CLAUDE L. WESTENSKOW, and GLADYS B. WESTENSKOW,

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, dba 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, dba GIBBONS & REED CONSTRUCTION COMPANY, and the STATE OF UTAH, a sovereign,

Defendants-Appellees.

Case No. 13716

BRIEF OF PLAINTIFFS-APPELLANTS

Appeal From Judgment Entered By Ernest F. Baldwin, Jr., Judge in The District Court of Salt Lake County.

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Case No. 13716

BRIEF OF PLAINTIFFS-APPELLANTS

Appeal From Judgment Entered By Ernest F. Baldwin, Jr., Judge in The District Court of Salt Lake County.

NATURE OF THE CASE

This matter involves three consolidated actions for damages against the State of Utah, Salt Lake County, and Gibbons & Reed 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. The Defendants State of Utah and Salt Lake County cross claimed against Gibbons & Reed Company.

DISPOSITION IN LOWER COURT

A trial before a jury was held in the Court of the Honorable Ernest F. Baldwin, Jr., Judge in the Third Judicial District Court on March 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, and 18, 1974. A special verdict was returned by the jury upon interrogatories submitted to it. The jury found that the highway project of the State of Utah was unreasonably defective or dangerous and that the Plaintiffs were damaged as a proximate result. (R. 720-23) The jury also 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 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 found that the State of Utah is liable for damages to all Plaintiffs as a result of the flood which occurred on August 17, 1969. (R. 776-77) The State was also adjudged liable for damages incurred by Plaintiffs Kunkel for flooding on April 3, 1969. (R. 777-78) However, contrary to the findings of the jury, the Court ruled that the County of Salt Lake and Gibbons & Reed Company were not liable for any damages suffered by any Plaintiffs. (R. 778) The Court also ruled that Gibbons & Reed Company was not liable for any damages under the cross claims of the State of Utah and Salt Lake County, and awarded costs in favor of Plaintiffs and against the State of Utah and in favor of Gibbons & Reed Company against Plaintiffs. (R. 778)

NATURE OF RELIEF SOUGHT ON APPEAL

The Plaintiffs-Appellants seek an order from this Court directing the trial court to modify its judgment in accord with the jury's verdict holding Salt Lake County and Gibbons & Reed Company liable jointly and severally with the State of Utah for the damages incurred by the Plaintiffs.

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. 6P) This

general area is located on the base slopes of Mt. Olympus which rises sharply from the valley floor as part of the Wasatch Front. (Ex. 1P) The Defendant Gibbons & Reed Company is a large Utah construction company. (R. 1775-1777)

The Highway Construction Project

In 1968, Gibbons & Reed Company was awarded a contract by the State of Utah to construct a segment of an interstate highway running north and south from Interstate 80 to approximately 4700 South following the route of old Wasatch Boulevard along the base slopes of the Wasatch Front. (R. 1776, Ex. 6P) The portion of this project relevant to this proceeding commences at 3900 South and runs on a downgrade to 4600 South and then rises sharply to join the old Wasatch Boulevard in a temporary terminus at approximately 4700 South. Virtually the entire portion of this section of the highway lies below the natural surface of the surrounding terrain. Thus, the highway was situated in an excavated "cut" which intercepted the natural drainage channels flowing down the mountainside from east to west. (R. 909, Ex. 1P) The point at which the downgrade ended at 4600 South and the rise to the temporary terminus commenced is described as a "grade sag" (R. 1104) and in fact formed a basin with only a small embankment on the west side protecting homes below and to the west of the project. (R. 1107-09)

In the construction process, Gibbons & Reed Company followed the State's plans but was unrestricted in two important areas: (1) It was given discretionary responsibility to protect the project during construction, and

(2) it was able to use its discretion in determining what sequence to accomplish the various steps of the project. (See R. 1786, 1787)

As of April 3, 1969 (the date of the first flood), the cut had been made across the slope. The storm drain system for the highway had not been completed. As of August 17, 1969 (the date of the second flood), the concrete road beds had been laid. (R. 1475-77) The cut banks had been denuded. (See Exs. 6P, 32P, 33P, 30P, 105D, 95D, 104D, 68P, 67P, 107D) No grass, sod or other materials had been placed permanently or temporarily to prevent erosion (*Id.*). The highway storm drain system had been connected to the County system, but no effort had been made to insure that either system was free of obstruction. (R. 1555, 1725, 1726, 1293) No permanent or temporary storm grates had been placed over the entrances to the storm drain system laterals to prevent debris from washing into the storm system. (R. 1298, 1557, 1860) Protective curbing and diking had been removed. (R. 1760, 1520A, 1354)

The Storm Drain System

Salt Lake County retained the engineering firm of Caldwell, Richards & Sorenson to prepare a Master Storm Drain Study for the County in 1964. (Ex. 73P) That study showed that the interstate highway involved in this litigation was contemplated. The Master Study, however, did not anticipate the temporary terminus or end of the freeway at 4700 South. Instead, the drawings in the Study showed that the highway was to continue southward for over a mile. (See 73P at fig. 23)

In addition, the Study specifically observed that the area in question was highly dangerous in terms of flooding potential. Concerning this subject, the Study contained the following observations (Ex. 73P):

> Listed briefly, some of the causes of flooding, and damage from flooding, throughout Salt Lake County are the following:
>
> * * *
>
> In the Foothills and Mountainside Slopes:
>
> (a) Flash floods on steep gullies and ravines.
>
> (b) Unwise filling of natural drainage courses, and failure to provide culverts or underground drainage systems.
>
> * * *
>
> Much flood damage could be prevented and drainage problems simplified, with proper planning and perhaps some legal restrictions. (Pages 1, 2)
>
> Once disturbed in grading, trenching or other types of movement this area [the mountain slopes and foothills] becomes highly vulnerable to washing and displacement when water applied to the surface becomes greater than can be readily absorbed. (Page 11)
>
> Rain may come in low volume steady fall over a period of many hours or it may come as a high intensity, short duration storm dropping a very heavy flow over a concentrated area or over a relatively large area. When this occurs so that rapid runoff from steeper slopes combines with that falling or running off the flatter slopes, there is created the problem of providing for the safe, orderly removal of this water from the area of origination to the final point of disposition. (Page 14)

Despite the relatively great cost of storm drainage, its provision to the maximum possible extent is, in every modern community, becoming regarded as a fundamental necessity. (Page 44)

A program of cleaning and repairing of these existing facilities will be necessary, as it was found during the field investigations that many catch basins and pipes are completely filled up. At the very least, this has caused nuisance to the public in the past. (Page 66)

[T]he engineering of storm drainage for hillside areas requires special considerations. A great deal more control of runoff waters is necessary because of the increased velocities created by building houses and streets on slopes where previously vegetation helped to absorb and lessen the runoff from a rain storm. Salt Lake County has allowed some hillside development without adequate provision for storm drainage. Subdividers have been permitted to fill in natural drainage courses and construct homes on the fill, without installing culverts or storm drain systems. In the area near 4500 South and Wasatch Boulevard, much damage has taken place during the following rainstorms, due to lack of adequate drainage facilities . . . The construction of Proposed Storm Drain "GG" is intended to relieve this situation. Construction of the Belt Route within the next 5 years will result in the relocation of Wasatch Boulevard to the east of its present location between Oakcliff Drive and Bernada Drive. Early construction of this portion of System "GG", in cooperation with the Utah Highway Department should have high priority. (Pages 78-79)

The evidence presented at the trial (and discussed more fully below) indicated the following matters:

(1) Storm Drain "GG" was never constructed. (R. 1156, 1197)

(2) Wasatch Boulevard was relocated and the effective use of the Boulevard as a drainage channel was eliminated because the high curb on the west side of the street was removed, allowing runoff water to flow across the Boulevard and down onto the freeway. (R. 1354, 1520A, 1540, 1543-44, 1558, 1760, 1762, 1763)

(3) The Storm Drains provided to drain the area were not adequate in size to carry the anticipated runoff from even a storm of anticipated volume and intensity. (R. 1669, 1681, 1201)

(4) No maintenance program was established by the County regarding the drains in question. As far as the County was aware, they had never been cleaned prior to the flooding in this case. (R. 1293, 1726)

(5) The connection between the Highway drain and the County drain did not conform to sound engineering principles because a large pipe was drained into a smaller pipe. (R. 1759, 1712)

(6) No permanent or temporary screens or grates were required or installed to protect lateral intakes. (R. 1860, 1292, 1298)

(7) At the time of the flood in the present case, the Storm Drain System was inadequate. (R. 1156)

The Storms

On April 3, 1969, a heavy rain storm resulted in runoff water washing down earth and debris from the construction site into the yard of Plaintiffs Kunkel. (R. 1029, Ex. 53P, R. 1048) Mr. and Mrs. Kunkel brought this matter to the attention of all Defendants through personal conversations and also through correspondence. (R. 1031, 1032, 1034, 1035, 1044)

On Sunday, August 17, 1969, at approximately 6:00 p.m., a heavy rainstorm occurred in the vicinity of 4500 South and Wasatch Boulevard. The amount of rain which fell in a period of about 45 minutes approximately 2.5 inches. (R. 1260, 1334, 1307-08) The jury found that the storm was not an "Act of God." (Finding G, R. 728)

The testimony revealed that storms of high intensity occur along the Wasatch Front and that the month of August is the month in which such storms most frequently occur. (R. 1265, 1305, 1603, 1614)

As the rain fell, runoff water from the residential area above Wasatch Boulevard flowed down from the Olympus Cove area to the relocated Boulevard. (R. 1762) In prior storms, such runoff water was channeled south by the Boulevard to the "Shadow Mountain Area" which is located nearly one mile south of the Plaintiffs' homes. (R. 1558) None of the Plaintiffs had ever encountered flooding damage prior to the construction here involved. (R. 826, 835, 846, 855, 860, 880, 954, 980, 1018, 1024, 1058, 1063, 1068, 1078, 1432)

Because the Boulevard no longer had a high curb or dike on the west edge, the flood waters were allowed to cascade over the Boulevard and to flow onto the new freeway below. As they did so, substantial quantities of earth from the denuded cut banks were eroded. (See Exs. 95D, 101D, 104D, 105D, 67P, 68P) At the time of the floods, the concrete highway road beds were in place but the cut ditches and barrow pits were unlined and unprotected. (R. 1488, 1475-77) The concrete road beds, constructed by defendants State of Utah and Gibbons & Reed, intercepted the flood waters which otherwise would have flowed west and downhill, substantially north of the Plaintiffs' homes. (R. 1558, Ex. 8P) The intercepted flood waters were channeled south and downhill in the highway cut to the low point of the grade sag. At that point, a large backup of water and debris was created. (Ex. 8P) Storm drains were inadequate to carry off the water. They had become completely filled with debris—some rocks 14 inches in diameter. (See Ex. 84P) The flood waters soon broke through the embankment on the west side of the freeway. A great torrent of water then rushed out of the grade sag reservoir and flooded the homes of the Plaintiffs. (Ex. 8P) The County storm sewer, which had become completely obstructed, also emitted water from two manholes which erupted in geyser-like fashion, also flooding the Plaintiffs' homes. (R. 806, 845)

The Damage

The evidence showed and the jury found that all 34 homes of the Plaintiffs sustained damages as a result of the flooding. (Finding A(2), R. 721-23) Counsel for the

State and County advised the trial court that the total damages exceeded $100,000.00.

The issue of the exact amount of damages was reserved for a later hearing.

The Defendants' Involvement

The State. The jury found that "with respect to the flood condition on August 17, 1969, the highway project of the State of Utah, including the storm drain system, was unreasonably defective or dangerous," and that all of the Plaintiffs had damage to their property as a proximate result of the State's project. (Finding A(1) and (2), R. 721) With respect to the flooding of the property of Mr. and Mrs. Kunkel on April 3, 1969, the jury found that "the improvements and highway project created by the State of Utah was unreasonably defective or dangerous." (Finding D(1) and (2), R. 727)

On the basis of the jury's findings, the trial court entered judgment against the State of Utah.

The County. The jury found that with respect to the flooding condition of August 17, 1969, "Salt Lake County unreasonably created a defective or dangerous condition in the utilization of its storm drain system and that this caused damage to all Plaintiffs." (Finding B(1) and (2), R. 723) The jury also found that Salt Lake County was negligent in failing to provide reasonably adequate drainage facilities for the highway project and that the Plaintiffs were damaged as a proximate result of said negligence. (Finding I, R. 728) With respect to Plaintiffs

Kunkel on April 3, 1969, the jury found that "Salt Lake County created an unreasonably defective or dangerous condition in the utilization of the storm sewer system," causing damage to the Kunkels. (Finding E(1) and (2), R. 727)

The trial court declined to enter judgment against the County.

Gibbons & Reed Company. The jury found that "Gibbons & Reed Company was negligent in that it failed to take reasonable precautions to protect the project during construction." This negligence proximately caused damage to Plaintiffs. (Findings J(1) and K, R. 728).

The trial court also declined to enter judgment against Gibbons & Reed Company.

Limitation on Liability

Under the Governmental Immunity Act, every policy of insurance purchased by a governmental entity must provide property damage coverage to a limit of not less than $50,000.00 in any one accident. (U.C.A. 63-30-29) Any judgment over the insurance coverage minimum amounts for property damage liability must be reduced by the court to a sum equal to the minimum requirements or the actual insurance coverage. (U.C.A. 63-30-34)

ARGUMENT

Summary of Plaintiffs' Position

The Plaintiffs contend that the Trial Court erred when it failed to enter judgment on the jury's verdict with respect to Salt Lake County and Gibbons & Reed; that the record strongly supports the jury's verdict both with respect to Salt Lake County and Gibbons & Reed; that the damages incurred by Plaintiffs constitute an inverse condemnation by the State of Utah and County of Salt Lake for the entire amount of which the State and County are liable.

POINT I.

THE TRIAL COURT ERRED BY ENTERING JUDGMENT INCONSISTENT WITH THE JURY'S FINDINGS.

The jury found that concerning the August 17, 1969, flooding, Salt Lake County unreasonably created a defective or dangerous condition in the utilization of its storm drain system "and that this proximately caused damage to all Plaintiffs." (Finding B(1) and (2), R.723) With respect to the Plaintiffs Kunkel on April 3, 1969, the jury further found "Salt Lake County created an unreasonably defective or dangerous condition in the utilization of the storm sewer system" and that this proximately damaged the Kunkels. (Finding E(1) and (2), R. 727) The jury also found that Salt Lake County was negligent in failing to provide reasonably adequate drainage facilities for the project. (Finding I, R. 728) The jury also found that Gibbons & Reed Company was negligent "in failing to take

reasonable precautions to protect the project during construction" and that such negligence proximately caused damage to Plaintiffs. (Finding J(1) and K, R. 728)

Despite these specific and clear findings, the Trial Court refused to enter judgment against Salt Lake County and Gibbons & Reed Company. This inconsistency between the jury's findings and the judgment constitutes error.

Rule 39 of the Utah Rules of Civil Procedure deals with "Trial by Jury or by the Court." Subsection (a) deals with trial "By Jury," and states as follows:

> When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the register of actions as a jury action. *The trial of all issues so demanded shall be by jury,* unless * * * [exceptions not herein applicable.] [Emphasis added.]

The latitude which the trial court has regarding the judgment to be entered in a case where special verdicts have been utilized under U.R.C.P. Rule 49 has been defined by the Utah Supreme Court as follows:

> It is recognized that where a case is submitted to the jury on special verdicts, the trial court may make corrections of obvious errors or defects therein, and he may make additional findings on issues which have not been submitted to the jury, but are necessary to settle the issues involved. *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. First Security Bank of Utah, N.A. v. Ezra C. Lundahl, Inc.,* 22 Utah 2d 433, 454 P.2d 886, 889 (1969). [Emphasis added.]

In that case, the trial judge made an additional finding which in effect nullified a finding made by the jury. The judge's additional finding was not allowed by the Utah Supreme Court to defeat the finding of the jury.

The relationship between findings and the judgment rendered thereon has been further stated as follows by the Utah Supreme Court:

> In Evans v. Shand, 74 Utah 451, 280 P. 239, this Court held that a valid judgment must not only rest upon pleadings but upon findings. It is fundamental that findings of fact and conclusions of law must proceed entry of judgment. Fisher v. Emerson, 15 Utah 517, 50 P. 619; Billings v. Parsons, 17 Utah 22, 53 P. 730. "It is fundamental that the conclusions of law must be predicated upon and find their support in the findings of fact, and the judgment must follow the conclusions of law" and *if the conclusions are at variance with the findings, the Supreme Court will order the lower court to set aside its erroneous conclusions and substitute the correct ones therefor.* This is the law as announced in Parrot Bros. Company v. Ogden City, 50 Utah 512, 167 P. 807. And, again, we find in Brittain v. Gorman, 42 Utah 586, 133 P. 370, that conclusions of law must be based upon facts and must be considered with the facts, and in like fashion, the Court's decree must rest upon legal conclusions and be consistent with them. A judgment, if in conformity with the findings, will not be disturbed. And, of course, the converse is true. *A judgment not in conformity with the findings can-*

> *not be permitted to stand. Mason v. Mason,* 160 P.2d 730, 732, 108 Utah 428 (1945). [Emphasis added.]

Any confusion arising among interrogatories to a jury and answers thereto should be resolved in accordance with the following standard:

> Whenever there is uncertainty or doubt in connection with the correlation of interrogatories with each other and their answers, they should be so interpreted as to harmonize with the findings of the jury if that can reasonably be done. *Pace v. Parrish,* 122 Utah 141, 247 P.2d 273, 275 (1952).

Here again, it is the intention of the jury which is controlling, not that of the judge.

The circumstances under which the court can amend or correct a verdict are set forth in the following language from 53 Am. Jur. Trials §1094, to which a footnote citation was made by the Utah Supreme Court in the quotation from the *Lundahl* case, *supra.*

> A verdict in a civil case which is defective or erroneous as to a mere matter of form not affecting the merits or rights of the parties may be amended by the court to conform it to the issues and to give effect to what the jury unmistakably found. In fact, it is the duty of the judge to look after its form and substance, so as to prevent a doubtful or insufficient finding from passing into the records of the court; and every reasonable construction should be adopted for the purpose of working the verdict into form so as to make it serve.
>
> Thus, where the trial judge misinterprets or fails to record the verdict the jury obviously in-

tended to render, it has been held to be within the power of the trial court to mold or amend the recorded verdict of the jury so as to make a verdict which in form inaccurately expresses the jury's intention conform exactly to what the jury intended to find, where the intention is obvious from the record; and in the event of the failure of the trial court so to mold the verdict the appellate court will do so.

While the practice of amending verdicts in matters of form is one of long standing, based on principles of the soundest public policy in the furtherance of justice, it is strictly limited to cases where the jury have expressed their meaning in an informal manner. The court has no power to supply substantial omissions, *and the amendment in all cases must be such as to make the verdict conform to the real intent of the jury. The judge cannot, under the guise of amending the verdict, invade the province of the jury or substitute his verdict for theirs. After the amendment the verdict must be not what the judge thinks it ought to have been, but what the jury intended it to be. Their actual intent, and not his notion of what they ought to have intended, is the thing to be expressed and worked out by the amendment.* 53 Am. Jur. Trials §1094 with 1973 pocket part addition inserted. [Emphasis added.]

The Utah Rules of Civil Procedure do provide a means whereby the verdict of a jury may be disregarded and a judgment inconsistent therewith may be entered. U.R.C.P. Rule 50(b), "Motion for Judgment Notwithstanding the Verdict" is intended,

> * * * to permit the trial judge to submit the case to the jury for their determination, then if the verdict goes adverse to the moving party, he can, when

> there is more time for deliberation, re-examine and rule upon whether a jury question exists. *Roche v. Zee,* 1 Utah 2d 193, 264 P.2d 855, 856 (1953).

However, a motion for judgment notwithstanding the verdict is not to be inferred, presumed, or judicially initiated, but must be specifically and timely made.

> To apply for the arrest of a judgment on an adverse verdict, the motion must be definite and specific. In exercising authority under a statute or rule of court to render a judgment notwithstanding the verdict, the power of the court must be properly invoked by the procedure therein provided, and the judgment may be rendered only after a full compliance with the provisions of the statute or rule. 46 Am. Jur. 2d Judgments §119.

No such motion having been made by Defendants Salt Lake County or Gibbons & Reed Company, the District Court had no authority to enter judgment contrary to the jury verdict. Neither has there been, nor could there be, a finding of an "absence of any substantial evidence to support the verdict" (*Koer v. Mayfair Markets,* 19 Utah 2d 339, 431 P.2d 566 (1967)), as would be required in order to enter a judgment notwithstanding the verdict, even if such were otherwise proper.

The rule is firmly established that a jury verdict is not to be upset if believable facts are adduced supporting it. See, *e.g., Estate of Hubbard,* 30 Utah 2d 260, 516 P.2d 741 (1973). Other cases have reached the same result. See *Taylor v. Weber County,* 4 Utah 2d 328, 293 P.2d 925 (1956), where it was held that when evidence amply sustains a verdict, the courts should not overturn it.

Similarly, in *Porter v. Price,* 11 Utah 2d 80, 355 P.2d 66 (1960), it was held that the verdict of a jury must not be set aside unless a reasonable man could not come to the same conclusion even when all evidence and inferences fairly derived therefrom are taken in the light most favorable to the prevailing party.

In *Winchester v. Egan Farm Service,* 4 Utah 2d 129, 288 P.2d 790 (1955), the Court reached a similar result, stating that in the absence of a showing that a jury's finding was not supported by evidence, the court should not disturb the jury's finding. No such showing has been made here. Indeed, as shown below, the jury's verdict is amply supported.

In other recent cases, the Utah Supreme Court has ruled that judges should be reluctant to interfere with jury verdicts and should not do so as long as there is any reasonable basis in evidence to justify such verdicts. *Brunson v. Strong,* 17 Utah 2d 364, 412 P.2d 451 (1966). *Accord, Gordon v. Provo City,* 15 Utah 2d 287, 391 P.2d 430 (1964); *Banks v. Shivers,* 20 Utah 2d 25, 432 P.2d 339 (1967).

In the present case, the trial court judge allowed the case to go to the jury which then rendered a verdict consistent with the evidence and finding all Defendants liable. But the trial court improperly departed from the jury verdict and entered a judgment which is opposite in result to the jury's findings relative to the liability of Salt Lake County and Gibbons & Reed Company. Such a course of judicial action is contrary to both the spirit and the letter

of the jury trial system, is contrary to established rules of law and procedure, and should not be permitted to stand. The judgment should be modified to conform to the verdict.

POINT II.

THE FACTS SUPPORT THE JURY'S FINDINGS CONCERNING SALT LAKE COUNTY AND GIBBONS & REED.

A. THE RECORD AMPLY SUPPORTS THE JURY'S FINDINGS AND THEREFORE THE COUNTY SHOULD ALSO BE HELD LIABLE.

Plaintiffs proved their case against the County under both the majority and dissenting opinions of *Sanford v. University of Utah,* 26 Utah 2d 285, 488 P.2d 741 (1971). In that case a landowner was flooded during a State-sponsored construction project following a heavy rain storm. The jury held the defendants liable under the applicable statutes. The elements to be shown in this type of case as required by the majority opinion in *Sanford* are (1) change in the natural drainage flow; (2) creation of a drainage system; (3) creation of a defective or dangerous condition; (4) knowledge of the danger; and (5) damage to Plaintiffs. The dissent added the additional requirement of a negligence showing. In this case the Plaintiffs established each of these elements as is more fully discussed below.

1. *Change in the Natural Drainage Flow.*

Exhibit 1P offered by Plaintiffs is an aerial photograph depicting the area in question and illustrating the

natural drainage flows. The testimony of Professor Harry Goode showed that the new highway intercepted the natural drainage flows and gathered runoff water "in the same way that a ditch would." (R. 909; see also Ex. 8-P)

By directing the runoff waters into storm drain Line C of the County system, the County engineer admitted that the natural drainage flow had ben changed. (R. 1711) Also, the County permitted the State to connect the highway drainage system into the County system, thereby becoming a party to the directing of runoff waters into unnatural courses. (R. 1467) In addition, the County permitted the removal of the protective "dike" (R. 1763) or high curbing along the western edge of old Wasatch Boulevard which had formerly channeled runoff waters south and away from the Plaintiffs. (R. 1520A, 1354, 1540, 1543-44, 1558, 1762). The lack of the Boulevard dike is evident in Exhibits 30P, 32P, 33P, 102D, and 82P.

Each of the Plaintiffs testified that storm waters had never caused damage to them prior to this project (see R. 826, 835, 846, 855, 860, 880, 954, 980, 1018, 1024, 1058, 1063, 1068, 1078, 1432).

2. *Creation of a Drainage System.*

There was no dispute that the County had created a drainage system. Exhibit 73P (the Master Study) clearly showed the County's plan and intent to create a system for the area in question. The County participated in the highway project by permitting the State to connect the highway system directly into the County system which was

extended through Line C of storm drain JJ to accommodate the portion of the highway containing the grade sag (see also R. 1467, Ex. 7P).

At the preconstruction conference held on May 29, 1968, the County was represented by the following individuals (see Ex. 7P):

William J. Wilson	County Highway Department
J. Rex MacKay	Director, County Flood Control
Marvin Melville	County Water System, Inc.
Lamont B. Gundersen	Director, County Highway Dept.
Earl Skillicorn	County Road System
A. H. Sorensen, Jr.	Engineer

These individuals participated in the joint planning of the project particularly as it affected the interconnection of the State project with the County facilities.

3. *Creation of a Defective or Dangerous Condition.*

At the time of the flood on August 17, 1969, storm waters exceeding the capacity of the clogged County storm drain Line C erupted from two manholes along the line, spewing water about ten feet high. (R. 806) The manholes erupted because of the obstruction in the County line. (R. 806) After the flood, Line C was found to be two-thirds full of silt and debris (R. 1282) for a length of about 700-800 feet. (R. 1288)

Prior to the flood and following the completion of the connection to the County Line C, absolutely no effect was made by the County or any other party to determine

whether Line C was free from obstructions. (R. 1293, 1555, 1557, 1725-26) This was the case even though the County was aware that any debris in the line would reduce its capacity. (R. 1661, 1517, Ex. 73P at page 66) In fact, Line C had never been maintained at all prior to the flood. (R. 1694, 1725-26) County officials charged with flood control responsibilities even denied that there was a County storm drain in the area immediately after the flooding occurred. (R. 1293)

No effort was made by the County to insist that the highway drain system be protected by grates or other devices to prevent materials and debris from entering Line C (R. 1298) As a result, all lateral intakes existing on the project were open and unprotected (R. 1298) allowing rocks and debris to enter the County's system. Expert witness Professor Cecil Jacobsen testified that it was not good engineering practice to have such unprotected lead drains, particularly during the vulnerable construction phase of the project. (R. 1849-53) County witness Nielsen testified that Line C was not designed to carry any substance other than water. (R. 1708). Thus, it was little wonder that the system did not function properly.

In addition, the portion of Line C which was clogged was constructed with less than a one percent slope for 660 feet. (R. 1707) Larger materials will settle out easier in such areas. (R. 1659) With less than one foot drop in one hundred horizontal feet, it is not surprising to find that 14-inch diameter rocks would not be flushed through Line C. The County witness testified that a 14-inch rock would materially reduce the capacity of the Line. (R. 1708)

The County further permitted the State to connect a 42-inch line into the smaller 36-inch Line C. (R. 1712) This connection occurred at the point the State highway system connected to the troublesome Line C. Good engineering practice dictates that

> pipe sizes should not decrease in the downstream direction even though increased slope may provide adequate capacity in the smaller pipe. Any debris which enters a drain must be carried through the system to the outlets, and the possibility of clogging a smaller pipe with debris which may pass a larger pipe is too great. (R. 1758-59)

Nevertheless, the County ignored this principle and permitted the State to connect the larger pipe into the smaller downstream pipe. The principle was shown to be accurate on August 17, 1969. Ten days were required for the County employees to clean the debris from the smaller pipe, Line C. (R. 1288)

In addition to the foregoing, the dangerous and defective character of the storm drain system was further illustrated in the testimony of County witness Sorensen. He testified that approximately 97.75 cubic feet per second of storm water was drained into Line C which was designed to carry only 87 cubic feet per second, assuming free-running water. (R. 1669) Moreover, Mr. Sorensen agreed that in addition to the 97.75 cfs, other areas drained into Line C which were not included in the total. (R. 1681) Thus, even greater quantities of water would be present to further overload the system. Professor Jacobsen testified (at R. 1156):

The Court: The question was the planning of the drainage system reasonably, meet reasonable standards to meet the runoff to be expected, was the sewer system capable of handling the reasonably anticipated runoff?

The Witness (Jacobsen): In my opinion, no very definitely because the engineers also planned another conduit or drain leading to the south to intercept part of this very area. So that an additional load was placed upon the system as constructed, which made it inadequate to carry this amount of runoff.

Q. (By Mr. Boyden): Now that additional sewer which was not constructed, referred to in the flood control report?

A. Right.

In addition to the inadequate capacity of Line C, the witnesses testified that the rainfall intensity chart which was used to determine the anticipated runoff in the area in question was insufficient and inapplicable. More rain falls on the mountain slopes than on the Salt Lake airport. (R. 1257, 1303, 1654-55) Nevertheless, the chart that was used to determine runoff was based upon airport and downtown Salt Lake weather statistics. (R. 1257), 1709-11) It is not sound engineering practice for the County to have used an inapplicable chart. (R. 1710)

Finally, the County permitted the removal of the protective dike and curbing along Wasatch Boulevard without providing for adequate drainage. This facilitated the erosion and washout of cut banks and the subsequent clogging of the County system.

Thus, the evidence was overwhelming that the County participated in the creation of a dangerous and defective condition in the following ways: (1) it failed totally to maintain its storm drain system; (2) it failed to determine whether Line C when connected was free from obstructions; (3) it failed to require that lead intakes were protected from accepting debris and rocks particularly during the construction period; (4) it permitted rocks and debris to enter the system which was not designed to handle such materials; (5) when the County agreed to the connection with its line, it knew it had constructed Line C with a very flat grade which made it susceptible to clogging; (6) it permitted the State to connect a larger drain pipe upstream to a smaller pipe also contributing to clogging; (7) it permitted the State to drain runoff water into a system which was already inadequate to handle anticipated runoff; (8) it relied upon unsound data in determining its requirements for runoff capacity; and (9) it permitted the removal of protective diking and curbing which would have directed the flood waters away from Plaintiffs.

The foregoing nine items furnish more than a sufficient basis for the jury's findings that "Salt Lake County unreasonably created a defective or dangerous condition in the utilization of its storm drain system" (Finding B(1), R. 723) and as required by the dissenting opinion in *Sanford v. University of Utah, supra,* "Salt Lake County was negligent in failing to provide reasonable, adequate drainage facilities for the highway project." (Finding I, (R. 728) Consequently, the trial court judge should have entered judgment against Salt Lake County.

4. *Salt Lake County Was Fully Aware of the Danger Possible In This Case.*

When the preconstruction conference was held on May 29, 1968, the following relevant portion of the minutes reflects that the County was aware of the problems involved in this case (Ex. 7P, page five):

> VI. County Planning.
>
> * * *
>
> Mackay [Director, Salt Lake County Flood Control]:
>
> > If we can start one and get going — we have engineering done. We need to tie into 36-inch line on Wasatch Blvd. which subsequently ties into our storm sewer. We have three problems: (1) sudden showers; (2) flood; (3) the public on our necks. I don't have contractor's schedule. I would suggest we sit down with the contractor and schedule it out. Upper residential section run-off will create problems.

See also R. 1751.

Other items of evidence also revealed the County's awareness of these problems. For example, as set forth in the Statement of Facts, *supra,* the County's Master Storm Drain Study (Ex. 73P) also indicated such awareness. See pages 1-2 (referring to "flash floods" on mountain slopes), page 11 (referring to erosion of excavated earth), page 14 (referring to runoff on steep slopes), and page 66 (referring to the need of good maintenance programs and the existence of clogged drains and pipes).

Most explicit is the section at pages 78-79 referring to specific flood damage in the area near the Plaintiffs at 4500 South and Wasatch Boulevard.

Another example of County awareness is found in Exhibit 121P which was an article appearing in the Salt Lake Tribune on July 31, 1965, describing flash floods along the Wasatch Front and specifically stating:

> Wasatch Boulevard in an area near 4400 South was covered with so much mud, rock and debris that it was closed for several hours while crews plowed it open.

Plaintiffs Kunkel also appraised the County of flooding problems in this area when they wrote several letters preceding the August 17, 1969, flooding. (See Exs. 53P, 54P, and 61P) County Commissioner Royal K. Hunt replied to Mrs. Kunkel on June 2, 1969:

> . . . I have requested the Recreation Department to cooperate with and instruct the WBBA and the Flood Control Department to provide whatever protection is feasible for your property to prevent flooding.

Obviously "whatever protection is feasible" was *not* provided by the County which failed to maintain its system and permitted the removal of protective dikes and curbing in addition to all of the other shortcomings noted above.

The County should also have been aware that August is the prime month for cloudburst floods along the Wasatch Front (R. 1303-05, 1265, 1603, 1614)

Thus, County awareness of the potential danger in this case was clearly established by the evidence.

5. *The Plaintiffs Were Injured As a Result of The Dangerous and Defective Condition Created by The County.*

In both of its findings concerning Salt Lake County, the jury expressly found that the Plaintiffs were proximately damaged as a result of County action. (Findings B2, I2, R. 723, 728) The evidence supported these findings. Plaintiffs testified concerning each and every home which was damaged. The path of the flood waters was traced on Exhibit 6 by the witnesses showing each home which was damaged. Numerous photographs of homes damaged by the floodwaters and showing the path of the floodwaters were also received in evidence. (see, *e.g.,* 108D, 50P, 51P, 52P, 19P, 21P, 48P, 49P, 26P, 27P, 46P, 12P, 13P, 14P, 15P, 25P, 24P, 20P, 22P, 11P, and 18P)

All of the Sanford Requirements Were Fulfilled.

As the foregoing has demonstrated, the requirements set down in the *Sanford* decision were met. Thus, when the trial court refused to enter judgment against the County in accord with the jury's findings which were supported by competent evidence, he committed error. This court can correct that error by directing the trial court to enter judgment against the County in favor of the Plaintiffs.*

* Plaintiff Richard Grotepas did not name the County as a Defendant and is thus not entitled to be included in said judgment.

The Trial Court Denied Defendants' Motion for a Directed Verdict.

At the close of all evidence, Defendants Salt Lake and the State of Utah each moved for a directed verdict. The trial court denied those motions. That denial with respect to Salt Lake County was upon the basis that Plaintiffs at that time had established a prima facie case with respect to each Defendant. The judge then submitted the case to the jury upon special interrogatories. The findings of the jury relating to the creation of a dangerous or defective condition and the negligence of the County were in response to the *only* questions posed by the Court.

To refuse to enter judgment in accord with those findings constitutes error which should be reversed.

B. THE EVIDENCE SUPPORTED THE JURY'S FINDINGS CONCERNING GIBBONS & REED'S NEGLIGENCE.

Findings J(1) and K stated that Gibbons & Reed Company was negligent in "failing to take reasonable precautions to protect the project during construction" and that "such negligence proximately caused damage to Plaintiffs." (R. 728) A review of pertinent evidence shows that there was ample support for these findings.

1. *Gibbons & Reed Was Aware of the Flooding Potential.*

Like Salt Lake County, Gibbons & Reed was fully aware of the flooding hazard which existed in the subject area. Four Gibbons & Reed representatives were present

at the preconstruction conference where flooding, cloudburst, and runoff hazards were discussed. (Ex. 7P) In addition, Gibbons & Reed also was a recipient of correspondence from the Plaintiffs Kunkel. (See Ex. 54P) Mrs. Kunkel states in one of her letters that she orally advised Mr. Noel Gold of Gibbons & Reed of the flooding problem. (Ex. 54P)

Gibbons & Reed, being a large general contractor in the Utah area, should have been aware of the likelihood of cloudburst floods in August along the Wasatch Front. Gibbons & Reed was a defendant in the *Sanford* case, and, therefore, had direct knowledge of the potential for flood damage.*

Exhibit 121P, appearing in a newspaper of general circulation in the Salt Lake City area, also served to provide added notice to Gibbons & Reed of the potential flooding hazard in the subject area.

2. *Despite Knowledge of the Hazard, Gibbons & Reed Took No Precautions To Protect the Project During Construction.*

As of August 17, 1969, the project was nearing completion. The denuded cut banks and unlined barrow pits created an added danger to the exposed storm sewer system which had been connected.

Gibbons & Reed had removed the protective barrier dike or curbing along Wasatch Boulevard and had elected

* The Sanford Flood occurred on July 17, 1967. 488 P.2d 742.

not to replace it until a more advanced stage of the construction process. (R. 1762) This decision was discretionary with Gibbons & Reed. (R. 1786) Similarly, Gibbons & Reed had not placed any of the concrete ditch liners. (R. 1786) Finaly, no effort was made to temporarily prevent cut bank erosion pending the planting of grass or sod, or to protect lateral drain openings from eroded debris, even though such erosion could be expected. (R. 1521)

Despite Gibbons & Reed's knowledge of the potential hazard, the company simply claimed that there was "no reason" to take any temporary measures whatever to protect the project. (R. 1860) This calculated risk obviously backfired, resulting in contributing to a large part of the damage in this case. Gibbons & Reed gambled that it would not rain during this critical construction phase. They lost that gamble and now Gibbons & Reed, not the Plaintiffs, should be made to pay for the losses.

3. *Temporary Protective Measures Would Have Been Reasonable to Prevent Injury to Plaintiffs.*

The specifications for the project require that Gibbons & Reed protect the project during construction and provide for proper drainage of the project. (R. 1860) Expert witness Professor Jacobsen testified that it would not be good practice to leave lead drains which feed into a closed drain line unprotected by grates particularly during the period of construction. (R. 1849) Professor Jacobsen further stated that clogfree drain covers could have been used as a temporary device to protect the lateral storm drain intakes during the construction period. (R. 1850-

51; see also 1202) Also, he stated that one project with which he was familiar, "ditch riders" had been employed to ensure that drain intakes remained unobstructed during storms. (R. 1853)

Gibbons & Reed saw "no need" to protect the project during this highly vulnerable construction phase in the most highly vulnerable storm month in one of the most highly vulnerable areas of the state. Given all the facts, the jury obviously disagreed with Gibbons & Reed and found that the company had negligently failed to protect the project and that this proximately contributed to the damage of Plaintiffs. (R. 728)

The trial judge therefore acted in error by refusing to enter judgment against Gibbons & Reed in favor of the Plaintiffs. That error should be corrected by this Court through an order directing the Trial Court to modify his judgment to hold Gibbons & Reed liable with the State and County.

4. *The Trial Judge Denied Gibbons & Reed's Motions For A Directed Verdict.*

Following the close of Plaintiffs' case (and also at the close of all evidence), counsel for Gibbons & Reed moved for a Directed Verdict. The Court denied that motion, stating. (at R. 1461)

> I deny the motion at this time. I am going to submit this to the Jury on Interrogatories.

It is thus clear that the Trial Court believed that Plaintiff had presented a prima facie case at that point of the

trial. The jury then answered one of the interrogatories propounded to it that Gibbons & Reed had acted negligently and that the Plaintiffs were damaged thereby.

It should be noted that the jury found that Gibbons & Reed was not negligent in following the State's plans. The Record was clear that the State supervised much of the construction. For this, Gibbons & Reed was not held accountable. However, in the critical area where Gibbons & Reed was permitted to exercise its own discretion (protecting the project during construction), the jury found that Gibbons & Reed was negligent and that the Plaintiffs were damaged thereby. Thus, the jury's verdict is internally consistent with the Record.

Because the Record supports the jury's findings, Gibbons & Reed should have been held liable under the trial court's judgment.

POINT III.

THE STATE AND COUNTY SHOULD BE HELD LIABLE IN THIS CASE UNDER THE DOCTRINE OF "INVERSE CONDEMNATION"

A. ONE OF PLAINTIFFS' CAUSES OF ACTION AGAINST THE STATE AND COUNTY WAS ERRONEOUSLY DISMISSED PRIOR TO TRIAL.

The Fourth Cause of Action set out in Plaintiffs' Complaint (see R. 4) claimed compensation for property which was "taken or damaged for public use" under Article I, Section 22, of the Utah Constitution. That cause of action was dismissed before trial. (R. 27)

Plaintiffs then appealed that ruling and this Court dismissed the appeals as premature, reserving to Plaintiffs the right to raise the issue at this time. (R. 47)

Because of the importance of this issue with respect to the ability of Plaintiffs to obtain complete recovery for the proven wrongful acts of the State, Plaintiffs raise this issue again and urge this Court to give particular attention to the consideration of this matter.

B. THE DOCTRINE OF INVERSE CONDEMNATION OFFERS NEEDED PROTECTION TO THE CITIZENS IN THIS CASE.

In essence, the doctrine of "inverse condemnation," if applied in Utah, would hold the State liable for damages suffered by the Plaintiffs on the basis of the Utah Constitution (Article I, Section 6), which requires the State to compensate a property owner for private property taken or damaged for public use. Cases from other jurisdictions have applied the doctrine even in situations where no negligence was found.*

In the present case, however, the jury found that the improvements constructed here were unreasonably defective or dangerous (Finding D1, R. 727), and that County was negligent in providing reasonably adequate drainage facilities for the project (Finding I, R. 728). Thus, it is not necessary to rely upon absolute liability to apply inverse condemnation in the present case. There exists

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* See, *e.g.*, Albert v. County of Los Angeles, 62 Cal. 2d 250, 398 P.2d 129 (1965).

an adequate basis for establishing the rule based upon traditional fault concepts.

Without the application of the doctrine of inverse condemnation in this case, the sources from which the Plaintiffs could satisfy their judgment could be severely limited, resulting in the payment of only a small fraction of their actual out-of-pocket losses. It is, therefore, essential that this Court apply this doctrine against the State to insure that justice is accomplished in this proceeding.

C. UTAH SHOULD ACCEPT THE DOCTRINE OF INVERSE CONDEMNATION ON A LIMITED BASIS WHERE FAULT IS ESTABLISHED.

Plaintiffs are mindful that heretofore this Court has not applied the doctrine of inverse condemnation.* Nevertheless, on the basis of the reasons set out below, Plaintiffs respectfully urge that this Court should reconsider its previously expressed views and apply the doctrine in this case where fault has been established.

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* Utah is in the minority of States which have not yet adopted the doctrine of inverse condemnation. The majority of States with similar constitutional language have accepted the doctrine. The trend is clearly in this direction. See, *e.g., State v. Leeson,* 84 Ariz. 44, 323 P.2d 692 (1958); *Pima County v. Bilby,* 87 Ariz. 366, 351 P.2d 647 (1960); *Rose v. State,* 19 Cal. 2d 713, 123 P.2d 505 (1942); *Bellman v. Contra Costa County,* 54 Cal. 2d 363, 353 P.2d 300 (1960); *City of Atlanta v. Donald,* 11 Ga. App. 339, 141 S.E. 2d 560 (1965); *Raymond v. State Dept. of Highways,* 255 La. 425, 231 So. 2d 375, (1970), *Garver v. Public Serv. Co. of N.M.,* 77 N.M. 262 421 P.2d 788 (1966); *Jamestown Plumbing & Heating Co. v. City of Jamestown,* 164 N.W. 2d 355 (N.D. 1969); *Leslie County v. Davidson,* 270 Ky. 705, 110 S.W. 2d 652 (1937); *Keck v. Hafley,* 237 S.W. 2d 527 (Ky. 1951); *Wilson v. State Rd. Dept.,* 201 So. 2d 619 (Fla. 1967); *Oklahoma City v. Wells,* 184 Okl. 369, 91 P.2d 1077 (1939); *Incorporated Town of Pittsburg v. Cochrane,* 200 Okl. 497, 197 P.2d 287 (1948); *Konrad v. State,* 4 Wis. 2d 532, 91 N.W. 2d 203 (1958); *Bare v. Department of Highways,* 401 P.2d 552 (Idaho 1965); *Heyert v. Orange and Rockland Utils. Inc.,* 262 N.Y.S. 2d 123 (1965), N.Y. Constitution Art. 1, §7; *Herro v. Wisconsin Fed. Surplus Property Develop. Corp.,* 42 Wis. 2d 87, 166 N.W. 2d 433 (1969).

1. *Utah Statutory Law Recognizes State Liability In Cases Where Fault Exists.*

The concept of sovereign immunity in Utah has been expressly abrogated by statute (63-30-1, *et. seq.).* Clearly, therefore, the State does not claim freedom from liability where facts meet the terms of the statute.

In this case, where fault has been found by a jury and upheld by the Trial Court Judge, the Constitution should be interpreted to protect the citizens who have had their property taken or damaged. To do otherwise, would result in a taking of private property without adequate compensation. This violates the Utah and Federal Constitutions.

2. *Highways Are Constructed Even Though Unforeseen Damage To Property Owners Is Possible.*

The public need for good highways dictates that these improvements will be constructed even though it is possible that property owners will be damaged in the process of construction. Thus, the State chooses to move forward with these projects knowing that definite risks exist. In the present case, the State proceeded with a project which the jury found was "unreasonably defective or dangerous." (Finding A, R. 721)

Under these circumstances where the State knew or should have known that the project would cause damage to the Plaintiffs, it may be fairly said that the State intended the damage which the Plaintiffs suffered. Where the State directly and intentionally damages others property,

damages should be awarded without the arbitrary limit imposed in this case through the statute. This arbitrary limit on liability is repugnant to basic due process concepts.

For this reason alone, this Court should apply the doctrine of inverse condemnation here and thereby sanction liability of the State on a Constitutional, rather than statutory, basis.

3. *The Damage Here Occurred as a Part of the Work As Deliberately Planned and Carried Out.*

The jury found that there was no intervening force or Act of God in this case. (Finding G, R. 728) This is not a situation where a reservoir crumbled in an earthquake or where some other natural hollocost occurred. No argument is made here that liability should be imposed in such cases.

But here, the damage ocurred because of the deliberately planned and executed project of the State with the assisting negligence of both Salt Lake County and Gibbons & Reed Company. Under these circumstances, application of the doctrine of inverse condemnation is appropriate and just.

4. *The Cost of the Damage In This Case Can Better Be Absorbed by the Taxpayers as a Whole.*

The question of who can better bear the burden of this loss is easy to answer. The Plaintiffs were damaged in such a way that each separate family was forced to pay an average of many thousands of dollars per household. The sources of satisfying the trial court's judgment to

compensate for the Plaintiffs' losses are limited without the application of the doctrine of inverse condemnation (or the finding that Gibbons & Reed is liable).

The damages suffered by the Plaintiffs in this case should properly be regarded as an additional cost of the highway project. When viewed in this light, the damages to Plaintiffs would increase the total cost of the project by only a small percentage of the overall project cost.

Certainly, that cost should be absorbed by the entire tax base rather than just a few homeowners, who through no fault of their own, were subjected to the inadequacies of the State, County and Contractor.

5. *If Not Fully Compensated, the Plaintiffs Would Be Forced to Contribute More Than Their Proper Share to the Public Undertaking.*

Plaintiffs are taxpayers and do not object to contributing their fair share to the cost of the public highway in question.

Without adequate compensation, however, each Plaintiff will be forced by the State to contribute many times the amount contributed by other citizens to this same project.

Obviously, this would yield a highly inequitable and unfair result. The Supreme Court of this State should not conclude that such a result was intended by the framers of the constitution nor the drafters of our statutes.

CONCLUSION

The natural drainage courses were deliberately but negligently changed to direct the flood waters where they would not have otherwise gone. The homes and property of faultless victims were severely damaged as a result of what the jury determined to be the creation of an unreasonably dangerous and defective improvement. The State and County collaborated in the assumption of a calculated risk. But for the heavy rain, their action would have been considered as economically profitable. Having lost their gamble, surely neither justice nor the public good require the sufferer to absorb the loss for either governmental unit. The jury found both County and State to be negligent. The Contractor was also found by the judges of the facts to be negligent in failing to protect the project during construction resulting in damage to the Plaintiffs. The jury's findings being fully supported by the facts, the trial court exceeded its authority in extricating the County and Gibbons & Reed from the penalty of their negligence.

This Court should reverse the decision of the Trial Court Judge and modify the Judgment to conform with the jury's findings.

DATED: December 21, 1974

Respectfully submited,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Brief were mailed to each of the individuals named below by First Class, postage prepaid mail this 23rd day of December, 1974.

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