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Bailey Service and Supply v. The State of Utah Road Commission : Brief of Appellant

Utah Supreme Court

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STATE OF UTAH

BAILEY SERVICE & SUPPLY
Corporation, a Corporation,
Plaintiff-Respondent,

-v-

THE STATE OF UTAH, by and
through its ROAD COMMISSION,
Defendant-Appellant.

Case No.
13857

BRIEF OF APPELLANTS

Appeal from the Judgment of the Third District
Court for Salt Lake County
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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

BAILEY SERVICE & SUPPLY Corporation, a Corporation,
Plaintiff-Respondent,

-v-

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Defendant-Appellant.

Case No. 13857

BRIEF OF APPELLANTS

NATURE OF THE CASE

This is an appeal from the judgment of the lower court on cross motions for summary judgment for money damages awarded to the plaintiff by reason of the erection of a viaduct on Fourth South Street in Salt Lake City, Utah.

DISPOSITION IN THE LOWER COURT

Summary judgment was granted to the plaintiff for money damages under a Memorandum Decision

finding a "taking" resulting from the erection of the viaduct. (R. 11-12)

RELIEF SOUGHT ON APPEAL

Appellant seeks a ruling reversing the judgment of the lower court as being contrary to the law in this jurisdiction, and awarding judgment of no cause of action to appellant as a matter of law.

STATEMENT OF FACTS

The controversy arises out of the erection of a viaduct over the railroad tracks West on Fourth South Street in Salt Lake City, Utah, by the defendant-appellant. Whereas, plaintiff had been able to use the whole width of Fourth South Street to gain access to its property prior to the construction, thereafter vehicles of the size previously used were not able to be utilized because the wall of the viaduct left 22'8" (two lanes) in front of the property and physically prevented use of the whole width of the street to maneuver.

For reasons which are not relevant to the issue here the State Road Commission authorized the execution of a Stipulation purporting to waive Governmental Immunity. (R. 71)

However, prior to argument by the respective parties of the cross motions for summary judgment, defendant determined that the attempt to waive Governmental Immunity was in all probability

without lawful sanction and so advised plaintiff. The issue of Governmental Immunity was raised in the memorandum supporting defendants motion for summary Judgment (R. 29) and argued in the lower court. Defendants answer did put in issue the stating of a claim upon which relief could be granted. (R. 68)

ARGUMENT

POINT I

ONLY THE LEGISLATURE OF THE STATE OF UTAH HAS AUTHORITY TO WAIVE GOVERNMENTAL IMMUNITY IN UTAH AND THE LOWER COURT ERRED IN REFUSING TO CONSIDER OR GIVE DUE WEIGHT TO THIS ISSUE.

Until 1965 Utah operated under a rule of law long and firmly established, of complete Governmental Immunity. The 1965 session of the Utah Legislature enacted what is now Chapter 30 of Title 63, Utah Code Annotated, 1953 as amended, and known and cited as "The Utah Governmental Immunity Act". The effect of the Act is not only to waive the states immunity for certain conduct on the part of agencies or units of government, but also to legislatively retain, reinforce and sanction the ancient rule of Governmental Immunity in respect to other areas of conduct. It is submitted that the legislature retained, reinforced and

maintained Governmental Immunity for the acts for which plaintiff has sought relief in the instant case.

Section 3 of the referenced Act provides:

> "Except as may be otherwise provided in the act, all governmental entities shall be immune from suit for any injury which may result from the activities of said entities wherein said entity is engaged in the exercise and discharge of a governmental function."

Other provisions of the Act waive immunity for certain matters (i.e. contractual obligation, Sec. 5; unsafe highways, Sec. 8) but in no provision of the Act is it "otherwise provided" that Governmental Immunity is waived for actions such as that brought by the plaintiff in this case. Thus, Section 3 of the Act serves as an insurmountable barrier to the successful maintenance of this case by plaintiff. The lower court, counsel, and the Road Commission are without legal authority to set aside this affirmative action of the Legislature of this State.

In some jurisdictions the Attorney General has the powers of an attorney general at common law, and Utah so ruled in *Hansen v. Barlow,* 23 Utah 2d. 47, 456 P.2d 177 (1969). This decision states the following proposition:

> . . . the Attorney General, in the absence of express legislative restriction to the contrary, may exercise all such power and authority as

> the public interests may from time to time require. In short the Attorney General's powers are as broad as the common law unless restricted or modified by statute . . .

Appellant submits that the legislature by enacting the Governmental Immunity Act in 1965 effectively preempted the otherwise inherent right of the Attorney General to waive Sovereign Immunity if indeed the Attorney General ever in fact had the right to waive Sovereign Immunity in any case.

In *Fairclough v. Salt Lake Co.* 10 Utah 2d 117 (1960) the Court held that sovereign immunity could not be waived except by constitutional or legislative enactment. The court further held that neither by constitutional nor legislative action had that doctrine been waived in this jurisdiction. The court said:

> . . . consistently and historically we have ruled that the State may not be sued without its consent, that Article I, § 22 of our Constitution is not self executing, nor does it give consent to be sued, implied or otherwise; *and that to secure such consent is a legislative matter* . . . (emphasis added)

Further, in the *Fairclough case, supra,* the court quoted from *Hjorth v. Whittenburg,* 121 Utah 324 (1952) on this issue of sovereign immunity:

> This phase of our law is well established and of long standing. If it is to be changed,

> that must come through the sovereign power of the commonwealth, the people, *speaking through the legislature.* (emphasis added)

It is thus the clearly enunciated rule in this jurisdiction that Governmental Immunity is waived only by legislative authority and not by agencies, departments or employees of the State.

As heretofore observed the legislature has since these cases, enacted the Governmental Immunity Act, but this enactment restates and reinforces sovereign immunity in the area at issue here. Decisions of this court since passage of the Governmental Immunity Act strongly reinforce this position.

In *State Road Commission v. Utah Sugar Company,* 22 Utah 2d 77 (1968), a case coming after enactment of the Governmental Immunity Act, the court clearly ruled that for actions of this type the Sovereign Immunity and the police power of the State had not been waived by legislative action when it said at p. 81:

> "Nor does the right to ingress or egress to or from ones property include any right in and to existing public traffic on the highway . . . The reason is that all traffic on public highways is controlled by police power of the State and what this police power may give an abutting property owner . . . it may take away. . . ."

The court went on to say that diversion of traffic was not compensable in that case "because such damages are 'damnum absque injuria' or damages without legal injury."

A case even more to the point is the recent (1973) one of *Holt v. Utah State Road Commission* 30 Utah 2d 4. Therein the plaintiff sought to recover damages for impaired access, precisely as in the instant case. After observing that there was no taking of property involved in that action, a condition identical again with the case at issue, the court, speaking through Justice Crockett held:

> The law has long been established in this State that under these circumstances there can be no recovery from the State for damages because the construction of a highway may impair or adversely affect the convenience of access to property.

The court then cites a series of cases by footnote, most of which are referred to in this brief, as having established that rule. Thus, it appears clearly that this court has maintained, since the passage of the Governmental Immunity Act, the long established rule of sovereign immunity and the valid exercise of the police power. But we are not left to conjecture as to the courts intent in *Holt supra,* for the court goes on to say that plaintiffs there urged that since the Governmental Immunity Act, it "should now be construed as permitting the

maintenance of such an action". After quoting Section 3 of the Act, supra, the court concludes:

> This seems to indicate an intention that the Act be strictly applied to preserve sovereign immunity; and to waive it only as clearly expressed therein.

It is apparent from the authorities cited, both the Governmental Immunity Act and the case law, that the attempted waiver by the authority of the State Road Commission and counsel, of the States' immunity in this case was void from the beginning, the legislature being the only body authorized to waive the State's immunity.

In its Memorandum Decision (R. 11) the lower court attempts to distinguish *Springville Banking Company v. Burton* 10 Utah 2d 100 by noting that that case was a case of sovereign immunity with no taking and resulting inconvenience. It is respectfully urged that this distinction is non existent since those are the identical factors existing in both cases. After noting that the issue of sovereign immunity had been raised by defendant the court says in its Memorandum Decision:

> However, in its brief at the top of page 10 defendant quotes a section from '3 Nichols on Eminent Domain' which quotation would indicate that the Springville Banking Case and other Utah cases following the general theory set forth therein, would not apply.

Defendant can only conclude that the Honorable Judge of the lower court views *Nichols* admittedly a pre-eminent authority in his field, as empowered to overrule not only the wisdom of the Legislature of Utah but also the judgments of this Honorable Court. With due deference to the excellence of both the authority *(Nichols)* and the lower court, we respectfully suggest that this is not and cannot be the status of the law in this jurisdiction.

In any event, the citation from *Nichols,* while accepted and urged by the defendant is not germane nor relevant to the issue for which it was cited by the lower court. There is no dearth of matters for which the law would and does allow compensation *provided* there is a lawful vehicle for getting the matter before the court and the police power is not prohibitive.

The fact that the damages alleged may be recoverable except for the valid and time honored bar of Sovereign Immunity does not work to invalidate the otherwise quite proper exercise of that bar. The quotation cited from *Nichols* deals with the compensability or non compensationability of a damage in *eminent domain. This is not a case of eminent domain.* The use of the citation by defendant in its brief as cited by the lower court was addressed to the merits of plaintiff's case, not to the issue of Sovereign Immunity and further reference will be made thereto in the section of this brief dealing with the merits. Defendant asserts that the error of plaintiff's

argument, as indeed the position adopted by the court below, is the assumption that all damage is compensable. The law of sovereign immunity and the valid exercise of the police power both represent areas where the court has negated that assumption on numerous occasions. (*Springville Banking Company v. Burton, Supra; Anderson Investment Corporation v. Utah State Road Commission, et al.,* 28 Utah 2d 379; *Hurst v. Highway Department of State of Utah,* 16 Utah 2d 153; and cases therein cited.)

POINT II

THE LOWER COURT ERRED IN CONCLUDING THAT THERE HAD BEEN A COMPENSABLE TAKING FROM PLAINTIFF SINCE THE VIADUCT WAS BUILT ENTIRELY WITHIN THE RIGHT OF WAY AND REASONABLE ACCESS TO PLAINTIFFS PROPERTY REMAINED AFTER THE CONSTRUCTION.

It appears from the Memorandum Decision (R. 11 - 12) of the lower court that the court did not even consider the police power doctrine nor the doctrine of damnum absque injuria, notwithstanding the numerous decisions of this court accepting and reinforcing those doctrines (Springville Bank, Anderson Investment, Hurst . . . supra) The parties have agreed that plaintiff could no longer use the whole of the street to maneu-

vre large vehicles into its facilities on Fourth South Street. The placing of a raised median divider as in the Springville Banking case, supra, would have had the identical result. Thus, for purposes of this case the erection of the viaduct may be considered as a raised median in testing the compensability of the alleged "take". At the hearing before the lower court on cross motions for summary judgment counsel for plaintiff objected that the exhibits attached to defendants memorandum in support of its motion were not sworn to. Then and now defendant asserts that no such formality is required since plaintiffs own affidavits contain an admission of the matter sought to be demonstrated by these exhibits; i.e., that prior to the erecting of the viaduct plaintiffs required the use of Fourth South across the center line thereof to gain access by its large vehicles. (R. 46)

We respectfully suggest that this court may take judicial notice of the fact that large type vehicles do in fact cross the centerline of streets in gaining access to particular properties. Painted medians do not deter such utilization no matter how marked. Does this usage, frequently carried on in direct violation of law and city ordinances, ripen into a vested right? Or, does the jurisdictional authority retain the right to control this and other uses by erecting raised medians or other structures to control traffic? It is asserted that at best the users acquire no more than permisive and temporary right. To view the matter otherwise is to ignore the long line of cases both before and since the *Springville Banking case, supra.* Further, to hold otherwise would be to

reverse the long standing rule that one may not adverse the Sovereign (*Cassity v. Castango,* 10 Utah 2d 16; *City of Oakland v. Burns* 296 P.2d 33.)

On this question, i.e., the acquisition of rights as against the city, town or other governmental body in connection with streets, it is submitted that the provisions of § 78-12-13, Utah Code Annotated, 1953, as amended are dispositive. That statute is explicit when it says:

> No person shall be allowed to acquire *any* right or title in or to any lands held by any town, city or county, or the corporate authorities thereof, designated for public use as streets . . . or for any other public purpose, by adverse possession thereof for any length of time . . . (emphasis added)

The rule is clear that "one may not adverse the Sovereign". (*Cassity v. Castango, supra; Lund v. Wilcox,* 34 Utah 205). There is ample case and encyclopedia law in support of this position. (55 ALR 2d 598)

There exists no absolute right to unreasonably deny access to property owners who front upon the public thoroughfare. Neither the police power reasonably to regulate the usage of the thoroughfare nor the principle of Sovereign Immunity have been held absolutely to bar recovery for unreasonable interference with abutters right of access. In *Springville Banking, supra,* the court noted at P. 103 that the principles of equity could be invoked to prevent unreasonable interference with

abutters rights. *Hampton v. State Road Commission* 21 Utah 2d 342 clearly establishes that the principle of Sovereign Immunity must yield in the case of a complete or nearly complete denial of access. Defendant does not take issue with the principles ennunciated in that case but on the contrary regards them as salutary. Nevertheless, the question here is not such a one. Here as in *Springville Banking Co. v. Burton, supra,* "access has not been denied, interfered with, it is true, but . . . to no unreasonable extent".

The rule of *Weir v. Palm Beach County,* 85 So. 2d 865, quoted at length in *Nichols on Eminent Domain* § 5.72 at 166 correctly gives perspective to the issues of this case when reveiwed on its merits, where it is said:

> The owner of property abutting a public way has a right of ingress to and egress from his property . . . However, these are rights subordinate to the underlying right of the public to enjoy the public way to its fullest extent as well as the right of the public to have the way improved to meet the demands of public convenience and necessity. If the improvement for the benefit of the public interferes with the preexisting means of ingress and egress. . . enjoyed by the individual property owner without an actual physical invasion of the land of the property owner, then again we have a situation where the individual right is subordinate to the public good and any alleged damages suffered is *damnum absque injuria.* This is so for the simple reason that

> one who acquires property abutting a public way acquires it subject and subordinate to the right of the public to have the way improved to meet the public need."

No reference is made in the above citation to Sovereign Immunity but the issue is determined solely on the public interest on the merits. Absent this rule the danger foreseen by Justice Henroid in the *Springville Banking case, supra,* must be recognized: "Highways would remain unmarked (unimproved) because of the prohibitive cost involved in payment of damages to owners on both sides . . ."

The court further held in the cited case:

> In this area of the freeway citizens must yield to the common weal, albeit injury to their property may result. We espouse the notion that if the Sovereign exercises its police power reasonably and for the good of all the people, when constructing highways, consequential damages such as those alleged here are not compensable."

The issue, then, is not one of the existence or amount of damages, but one of compensability. In order for the plaintiff to finally prevail in this matter it is submitted that it must show a material distinction between its circumstances and those which have prevailed in the long line of divider and viaduct cases which have been ruled upon by this court and supported by the overwhelming

weight of authority from other jurisdictions. It is respectfully suggested that no such distinction exists.

In *Anderson Investment Corporation v. Utah State Road Commission* et al., 28 Utah 2d 379 this court dealt with a case practically on all fours with the instant proceedings. There the State constructed a viaduct on North Temple Street in Salt Lake City, the east end of which was placed in front of the plaintiffs property. The viaduct was erected on property owned by the State and no real estate was required or acquired from the plaintiff. The width of the street remaining in front of plaintiff's property was reduced, but a lane of traffic east on North Temple street remained. Plaintiff in the cited case sought approximately $38,000 in damages for impairment of access, ingress and egress, depreciation of its property and for changing grade in front of its premises among other things. The plaintiff relied on *State v. Fourth Judicial District Court* 94 Utah 384 where the court by Dicta had implied a liability on the part of the individual road commissioners though the commission itself was held to be immune from suit. This court speaking through Justice Ellett said:

> "(H)ere these Commissioners were in the performance of their duties in the exercise of the police power of the State to better provide for the orderly flow of traffic upon the highways of this state. They are thus given the same immunity from suit as is given to the

State of Utah or to its commissioners". (emphasis added)

We urge that any practical distinction between the instant case and *Anderson Investment, supra,* favors the latter, since the width of the street remaining in front of Andersons was considerably less than the plaintiff in this action enjoys. Otherwise it is difficult to find a distinction since the viaducts are built within four blocks of each other in the same city and subject to the same legal principles.

Plaintiff here claims $8700 damages because of its need to build a new access point for its large type vehicles which can no longer maneuver across the whole width of Fourth South Street. On its merits, therefore, the case becomes one of "reasonable" access. Two lanes of traffic (more than 22 feet) remain in front of plaintiffs premises and thus it is clear that reasonable access remains for any ordinary usage. Does the particular usage being engaged in by the plaintiff at the time of the construction justify a different view? The bulk of defendants memorandum in the court below was directed to this question. It is submitted that the text and case law clearly demonstrates that no such view is justified. May a particular use ripen into a compensable right as against the Sovereign?

A case almost identical in its facts was before the court in *Moorlane Co. v. Highway Department of the State of Texas,* 384 S.W. 2d 415 (1964). The defen-

dants had constructed a viaduct and a controlled access highway through Amarillo which made it impossible for large trucks to turn into plaintiff's building, but which was wide enough for ordinary traffic flow. The court held at p. 418:

> The appellants still had access to their property and trucks could load and unload at the truck bay of appellants, although the large trucks could not use this street in its entirety as had been used before the overpass was built and were not entitled to recover damages from appellees because they could not use all or a greater portion of the street in backing the large trucks across the street.

The facts of the *Moorlane* case are restated in the holding and are, it is suggested, identical to those which concern us here. The quoted portion of that ruling might be lifted verbatim into a commentary on the facts of our case. But Texas has not stopped there. In a subsequent decision, *Collins v. City of San Antonio* 443, S.W. 2d 563 (1969) it is said: "The interference with plaintiffs access from Guadalupe Street appears to be greater than that which resulted from the construction of the improvements in *Moorlane.*" Yet, after noting that the question of unreasonable interference with a land owners right of access is one of law, the court says: "We hold that as a matter of law, plaintiff still has reasonable access to his property from Guadalupe Street."

In this context we refer to the citation from *Nichols* which the lower court deemed sufficient to amend the settled law of this jurisdiction. In 3 *Nichols, Eminent Domain* § 10.221(5) at 377 it is said:

> By the great weight of authority, it has been held that the extent of an abutters right of access may be reasonably regulated in the public interest. Such regulation, however, cannot validly extend to the point of total deprivation of access without incurring liability to pay compensation".

Elsewhere in this brief we have asserted defendants recognition of this general rule as salutary. Our dissatisfaction with the ruling of the lower court rests with the apparent assumption that the rule proves the fact. It seems that the first sentence of the citation has been completely ignored, and that the last sentence is deemed a statement of fact in this case. How can it be reasonably said that a two lane road, in excess of 22 feet in width constitutes a "total deprivation of access"? We respectfully suggest that the rule of "reasonableness" of access has not yet been applied to the facts of this case. Thus, the issue boils down to whether or not the particular use heretofore made by the plaintiff in derogation of the right of passage and utilization of the roadway by other members of the public ripens into a compensable right when redressed in favor of the public in general.

The case and text law cited hereinabove clearly shows that if the decision of the lower court is allowed to stand this jurisdiction has significantly retreated from, if not overturned, a long established rule as enunciated by this court, and adhered to by our sister states, and has embarked on a singular course.

CONCLUSION

The action of the lower court in failing to consider the States immunity under the law was and is error. Neither the State Road Commission nor counsel is vested with authority to abrogate the legislative reaffirmation of Sovereign Immunity appearing in the statutes of this State as the Utah Governmental Immunity Act. Thus, defendant was entitled to judgment of dismissal as a matter of law.

A consideration of this case on its merits also entitles defendant to a judgment of dismissal. The interference with plaintiffs access is not unreasonable on the criteria established by this court and followed by other jurisdictions. On the contrary it clearly appears that the construction of the viaduct was in furtherance of the duties and responsibilities of the State Road Commission in the public interest and that the control of traffic resulting therefrom was well within the police power of the State. Thus any damages suffered by the plaintiffs must be held to be *damnum absque injuria* and non compensatory under the settled law of this jurisdiction.

It is respectfully urged that this court reverse the judgment of the lower court and judgment be ordered for defendant as a matter of law.

Respectfully submitted,

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