

2001

Gorgoza, Incorporated; James B. Conkling; Donna D. Conkling v. The State of Utah Road Commission : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT
BRIEF

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REME COURT
TE OF UTAH

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

GORGOSA, INCORPORATED,
a corporation, and JAMES
B. CONKLING and DONNA D.
CONKLING, his wife,

Plaintiffs and
Appellants

vs.

STATE OF UTAH, by and
through its ROAD COMMISSION

Defendant and
Respondent

Case No. 14351

BRIEF OF APPELLANTS

Appeal from Judgment of the Third
Judicial District Court of Salt
Lake County, State of Utah
Honorable Ernest F. Baldwin, Jr., Judge

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FILED

FEB 20 1976

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a corporation, and JAMES)
B. CONKLING and DONNA D.)
CONKLING, his wife,) Case No. 14351

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IN THE SUPREME COURT
OF THE STATE OF UTAH

GORGOZA, INCORPORATED,)	
a corporation, and JAMES)	
B. CONKLING and DONNA D.)	
CONKLING, his wife,)	Case No. 14351
Plaintiffs and)	
Appellants)	
vs.)	
STATE OF UTAH, by and)	
through its ROAD COMMISSION,)	
Defendant and)	
Respondent)	

BRIEF OF APPELLANTS

STATEMENT OF THE CASE

This is an action to recover damages for the breach of a contract under which the defendant Utah State Road Commission (now Department of Transportation) obligated itself to provide reasonable commercial access to the plaintiffs' winter resort facilities pursuant to eminent domain proceedings in which the State Road Commission eventually condemned approximately eight acres of the plaintiffs' land. In the same action, plaintiffs alleged that the Commission negligently created a defective, unsafe and dangerous condition of a highway and other public improvements which caused the plaintiffs' injury.

DISPOSITION IN LOWER COURT

Plaintiffs appeal from an order of the Third Judicial District Court, the Honorable Ernest F. Baldwin, Jr., Judge,

granting defendant State Road Commission's motion for summary judgment and dismissing plaintiffs' complaint with prejudice on the grounds that no binding agreement or enforceable contract existed between the parties and that the State had not, therefore, waived its immunity from suits of this kind. (R. 133.)

RELIEF SOUGHT ON APPEAL

Plaintiffs pray the court to reverse the aforesaid summary judgment and to remand the case for trial.

STATEMENT OF FACTS

In response to Governor Rampton's appeal for the development of new industries in Utah, plaintiffs James B. and Donna D. Conkling initiated and developed the Gorgoza Summer-Winter Resort which opened for business in Summit County, Utah, during the month of December, 1968. (R. 1, 38.) Following a profitable first year's operation, the State Road Commission closed the lower portion of Parley's Canyon for the purpose of constructing a section of Interstate Highway 80 - East. After unsuccessfully appealing the closure and in spite of the difficulties presented thereby, Gorgoza managed to remain in operation for a second year. Planned investments in summer facilities were necessarily postponed, however, as potential investors withdrew their subscriptions and the SBA declined to approve Gorgoza's loan application.

When Parley's Canyon reopened during the summer of

1970, Gorgoza obtained the required financing and began construction of additional summer and winter facilities, reserving additional funds to complete its summer facilities the following spring. In September of 1970, the resort embarked upon its third year of operations.

Prior to reopening for its third winter season, Gorgoza officials held several meetings with representatives of the State Department of Highways in an attempt to determine how the resort would be affected by future I-80 and frontage road construction projects. In addition, Gorgoza officials supplied the State with cost data and other information which pointed out Gorgoza's need for adequate access to its commercial and recreational facilities during periods of construction in the canyon. (R. 33-35.)

In early spring of 1971, the plaintiffs became concerned about the indefinite work schedule on I-80 and the frontage road, the lack of specific information regarding commercial access from U.S. 40 during the upcoming construction periods, and unresolved problems about entrance lighting and highway signs. Plaintiff James Conkling therefore initiated direct correspondence with Mr. Henry Helland, Director of the Department of Highways, concerning these problems. (R. 36-40.) When the Department's response failed to provide sufficiently detailed information on which to base future development plans, Mr. Conkling by letter of May 29, 1971, specifically requested the State's assurance "that we will have the kind of access that will permit us to stay in business during the construction stages." (R. 40.)

During the first week of June, 1971, Mr. Leland D. Ford, attorney for the State Road Commission, contacted Mr. Robert F. Orton, attorney for plaintiffs, and requested that Mr. Orton accept service of process and consent to the entry of an order of immediate occupancy on behalf of Gorgoza in an eminent domain proceeding which was being instituted by the State for the purpose of condemning approximately eight acres of the plaintiffs' land. (R. 1, 76.) Mr. Orton agreed to accept service of process and to consent to immediate entry of the order in exchange for the State's promise that certain terms, provisions, and obligations regarding access to and use of Gorgoza's remaining property during the construction period would be incorporated into and made a part of the order. (R. 76.) Thereafter Mr. Ford submitted a proposed order of immediate occupancy to Mr. Orton which was rejected on the grounds that it did not spell out the State's obligations in sufficient detail. (R. 76 and Exhibit "A" at 80-82.)

On the 7th day of June, 1971, Mr. Orton and Mr. Ford negotiated and agreed upon the terms to be included in the order of immediate occupancy to be entered by the Fourth Judicial District Court of Summit County, State of Utah. (R. 76.) On the same day, Mr. Orton acknowledged service of process on behalf of Gorgoza and the court entered the order incorporating the stipulation and agreement of the parties. (R. 77 and Exhibit "B" at 87-89.) Following the entry of said order, the venue of the

eminent domain proceedings was changed to the Third Judicial District Court of Salt Lake County, State of Utah. (R. 77.)

By stipulating and agreeing to the entry of said order of immediate occupancy, defendant State Road Commission agreed and was ordered to provide plaintiffs and the general public with reasonable access to the remaining property of Gorgoza so as not to interfere with the commercial and recreational activities being conducted thereon, nor to discourage the general public from frequenting and going upon the property. (R. 77.) The term "reasonable" for purposes of the order was defined to include "safe and easy ingress and egress to and from said property and notice to the general public of the access to Gorgoza's remaining property." (R. 88.) Defendant State Road Commission further agreed to be enjoined and was enjoined by the order from hindering or interfering with the use, occupation and enjoyment by plaintiffs of their remaining property and the commercial and recreational activities being conducted thereon. (R. 77.)

During the fall of 1971, an intolerable situation developed regarding access to Gorgoza's property. (R. 21.) The frontage road had not been completed, no access route from U.S. 40 had been constructed, and the deadline for deciding whether to reopen for a fourth winter season was rapidly approaching. (R. 41.) Because of the seriousness of the problem, on September 24, 1971, James Conkling met directly with Governor Rampton to inform him of the situation and to appeal for emergency aid. (R. 21.) Following this meeting, Mr. Conkling met with

representatives of the State Department of Highways on September 28, 1971, to discuss the problem and to submit certain data prepared by Gorgoza for the State's review. (R. 21, 41-45.) At this meeting, the State Highway Engineer, Mr. Blaine Kay, gave assurances that Gorgoza would be promptly provided with a surfaced entrance and driveway in the area of Gorgoza's choice so as to alleviate the critical access problem. (R. 21.) On October 5, 1971, Mr. Conkling again contacted Mr. Kay to inform him of his concern over the State's apparent decision to improve Gorgoza's sloping middle entrance instead of its level western entrance as previously discussed, and to request further assurances that adequate commercial access would be made available so that the crucial decision about opening for the 1971-72 winter season could be made. (R. 46, 48.)

Although the State did construct an access to Gorgoza's property by way of its middle entrance on or about October 15, 1971, by October 29, 1971, it was apparent that the access was in utter disrepair. (R. 50-51.) On November 2, Mr. Conkling notified Mr. Kay of the terrible condition of the access road and urgently requested that improvements be made to correct the situation. (R. 50.) Mr. Kay consequently reminded the district engineer in writing of the State's commitment to Gorgoza and directed him to make the necessary improvements as soon as possible. (R. 51.)

On November 11, Gorgoza received notice from its insurance company that its policies had been cancelled on the

grounds that the resort was not ready for inspection due to the access problem. (R. 22.) Faced with this development together with the intolerable access situation, Gorgoza officials decided to discontinue operations indefinitely and so notified the State. (R. 52.)

During the summer of 1972, the access situation had still not improved which resulted in further deterioration of prospective investor interest. (R. 22.) Gorgoza officials therefore obtained an order to show cause why the order of immediate occupancy previously entered should not be vacated and the condemnation action dismissed or, alternatively, why they should not be granted other appropriate relief. (R. 77 and Exhibit "C" at 94.) On the 27th day of October, 1972, the parties stipulated and agreed to the entry of an order on order to show cause which permitted Gorgoza officials to assert their claims for damages arising out of the alleged breach of the provisions of the order of immediate occupancy in an independent action. (R. 77-78 and Exhibit "D" at 96.)

On November 7, 1972, the parties entered into a stipulation for just compensation in the eminent domain proceedings which stipulation contained the following language:

Defendants [Gorgoza, Incorporated, James B. Conkling and Donna D. Conkling] reserve all rights described in the order on order to show cause entered by this Court on the 27th day of October, 1972, which order is on file herein and further reserve all rights described in the order of immediate occupancy dated the 7th day of June, 1971, which order of immediate occupancy is on file herein and the parties hereto

hereby agree that they shall continue to be bound by all of the provisions of said order of immediate occupancy. (R. 78.) (Emphasis added.)

The stipulation described above did not fully dispose of the eminent domain proceedings and a trial was thereafter conducted. Following the trial, the Third Judicial District Court of Salt Lake County, State of Utah, entered findings of fact and conclusions of law which provided as follows:

Defendants Gorgoza and Conkling have reserved all rights described in the order on order to show cause entered by this Court on the 27th day of October, 1972, and in the order of immediate occupancy dated June 7, 1971, and the Court finds that defendants have not waived any of said rights. (Finding of Fact Number 23, R. 78; See also Conclusion of Law Number 6, R. 78.)

The plaintiffs filed their complaint for money damages against the State Road Commission and its general contractor on February 8, 1974. (R. 1.) Following discovery procedures, both Gorgoza and the State Road Commission filed motions for summary judgment supported by a stipulation of facts on the sole issue whether the agreement between the parties which was incorporated into the order of immediate occupancy entered on June 7, 1971, constituted a valid contractual obligation which was binding on the State. (R. 119-20; 128-29.)

After duly considering the motions, the Honorable Ernest F. Baldwin, Jr. adopted the parties' stipulation of facts and granted defendant State Road Commission's motion for summary judgment as prayed. (R. 130-32.) The court then dismissed plaintiffs' entire complaint, including the negligence count, with prejudice and this appeal followed.

ARGUMENT

POINT I

THE AGREEMENT BETWEEN GORGOZA AND THE STATE ROAD COMMISSION, NEGOTIATED AND EXECUTED BY THE ATTORNEY FOR THE COMMISSION, CREATED A BINDING CONTRACTUAL OBLIGATION WHICH IS ENFORCEABLE AGAINST THE STATE, SINCE THE AGREEMENT WAS FULLY ADOPTED AND RATIFIED BY THE COMMISSION FOLLOWING ITS EXECUTION BY THE STATE'S ATTORNEY.

The sole issue submitted to the lower court for determination on the parties' respective motions for summary judgment was whether a valid, existing and enforceable contract between Gorgoza and the State Road Commission was created under the factual situation before the court. Gorgoza contends that the lower court erred in its first, sixth, and seventh conclusions of law to the effect that no such contract was created under the facts. (R. 130-31.)

A. COURTS WILL ENFORCE CONTRACTUAL OBLIGATIONS ENTERED INTO BY THE PARTIES TO A CONDEMNATION SUIT.

Courts have frequently pointed out the difference in legal effect between mere promissory statements made by a condemning authority and valid, contractual, and therefore binding stipulations between the parties to a condemnation suit. 26 Am.Jur.2d Eminent Domain §154 at 821 (1966); Annot., 7 ALR2d 364, 392 (1949). If a particular case involves an agreement based on mutual assent and legal consideration, the agreement is properly to be considered in determining the property owner's damages or compensation. See Annot., 7 ALR2d. supra at 393,

and cases cited therein. If a binding stipulation does exist, numerous courts have declared that any marked departure therefrom as to the character of the work to be accomplished or the rights to be reserved would subject the condemnor to an action for damages in favor of the landowner whose land was being taken. Id. at 397.

Although Gorgoza does not contend that its remaining property was "taken" by the State's failure to provide reasonable commercial access as agreed, it does contend that the cases cited above clearly support the principle that binding contractual agreements between the condemning authority and the condemnee will be given legal effect where necessary to protect the landowner from additional damage caused by the condemnor's subsequent breach.

In the instant case, the stipulation of facts on file herein makes it clear that:

1. Plaintiffs and defendant State Road Commission by and through their respective attorneys arrived at the terms of an agreement regarding commercial access to plaintiffs' remaining land by negotiation and mutual assent. (Stipulation of Facts Nos. 3, 4, 5 and 6, R. 76.)

2. The terms of this agreement were subsequently incorporated into the order of immediate occupancy entered by the court on June 7, 1971. (Stipulation of Fact No. 6, R. 76.)

3. In arriving at the terms of the agreement, plaintiffs' attorney promised to accept service of process on behalf of his

clients and thereby waived Gorgoza's objections to the proposed location of the new highway in exchange for the State's promise to incorporate certain terms, provisions and obligations regarding access and use of plaintiffs' remaining property into the proposed order of immediate occupancy. (Stipulation of Fact No. 4, R. 76.)

4. Plaintiffs thereby incurred a legal detriment in that they agreed to accept service of process and to permit immediate entry of an order of immediate occupancy which they were not previously obligated to do. Plaintiffs simultaneously conferred a benefit on defendant State Road Commission by eliminating the time and expense of serving process on nonresident defendants, waiting for a hearing date on the motion, and presenting evidence in support of the motion at the hearing. (Stipulation of Facts Nos. 3 and 4, R. 76.)

5. Similarly, defendant State Road Commission incurred a legal detriment by promising to provide reasonable access to plaintiffs' remaining land and to be enjoined from interfering with plaintiff's commercial and recreational use, both of which duties defendant State Road Commission was not previously obligated to perform. (Stipulation of Fact No. 8, R. 77; R. 105.) Simultaneously, defendant State Road Commission conferred a benefit on plaintiffs by saving them the time and expense of additional litigation or negotiating procedures to resolve the problem at that time.

6. The terms of the agreement between the parties have not been altered in any way since the order of immediate occupancy was entered on June 7, 1971. On the contrary, the parties subsequently reaffirmed the provisions of the order and agreed to continue to be bound thereby. (Stipulation of Fact No. 12, R. 78.)

It is fundamental contract law that an agreement between two or more parties having capacity to contract, which is based on mutual assent and supported by legally sufficient consideration, creates a binding obligation in the absence of any grounds for disaffirming the contract. 1 S. Williston, Contracts §1 (3d ed. 1957). Furthermore, it makes no difference whether the terms of the contract are embodied in a formal pleading or in a separate instrument as long as the terms are clear and not altered by subsequent agreement of the parties. See Annot., 7 ALR2d 364, supra. In the instant case, plaintiffs contend that the basic elements of an enforceable contractual obligation have been stipulated to by the parties before the court. The State denies that it is bound by the agreement, however, on the grounds (inter alia) that its attorney lacked power to bind the Commission without its prior knowledge, approval and consent. (R. 107-08.)

B. WHATEVER ACTS PUBLIC OFFICIALS MAY DO OR AUTHORIZE TO BE DONE IN THE FIRST INSTANCE MAY SUBSEQUENTLY BE ADOPTED AND RATIFIED BY THEM.

According to the general rule set forth in the cases and supported by the decisions of this court, the contractual act

of a public officer which is beyond the scope of his authority is not binding on the state unless the following conditions are met:

1. The particular state agency involved would have been authorized to perform the act or enter into the agreement in the first instance; and

2. The state agency either held out the officer as having authority to perform the original act or subsequently ratified the act with full knowledge of the facts. Fareilly Lake Levee District v. Hampton, 228 Ark. 242, 306 S.W.2d 699 (1957); Yaeger v. Giguierre, 222 Minn. 41, 23 N.W.2d 22 (1946). See also State Road Commission v. Bates, 20 Utah 2d 175, 435 P.2d 417 (1967).

In the context of the case at bar, the Yaeger case is particularly enlightening. In that case the plaintiffs, as members of the police department and taxpayers in the City of South St. Paul, brought suit against the city treasurer and others to enjoin the defendants from paying out any further public funds as compensation for the services of one Ed Giguierre who was allegedly employed as a police officer in violation of certain civil service statutes and local rules. The nub of the controversy was that defendant Giguierre obtained a leave of absence with the approval of the police chief, but without the final approval of the civil service commission as required under the rules. From a judgment denying injunctive relief, the plaintiffs appealed. The Supreme Court of Minnesota affirmed the lower

court on the grounds that the subsequent act of the commission in approving defendant's leave, constituted a valid ratification of the police chief's action:

There can be no question that the commission had the authority in the first instance to approve the leave as granted by the chief of police. It is a general rule that whatever acts public officials may do or authorize to be done in the first instance may subsequently be adopted or ratified by them with the same effect as though properly done under previous authority. Applying this rule to the instant case, it is clear that the civil service commission by its belated action ratified the granting of a leave of absence with the same effect as if originally authorized. 23 N.W. 2d at 25 (citations omitted).

The decision of the Supreme Court of Minnesota in Yaeger is consistent with this court's decision in the case of State Road Commission v. Bates, 20 Utah 2d 175, 435 P.2d 417 (1967). In that case, the State Road Commission brought a condemnation action to obtain a narrow strip of land belonging to the defendants which adjoined a nonaccess freeway. No issue was raised as to the state's right to take the land or as to the value thereof. The landowners did claim severance damage to their remaining land, however, by reason of their loss of access to the canyon stream for stock watering purposes. This contention was based upon an alleged promise by the state's negotiator that if the landowners would sign the deed, the Commission would provide the water. 435 P.2d at 417.

In affirming the lower court's decision, this court held that the evidence supported the findings that the landowners

had been previously paid for their loss of access to water and that the purported promise of the state's negotiator to get water up onto the defendant's land was not binding on the Commission. 435 P.2d at 418. This holding, however, was based on a factual situation that is clearly distinguishable from the case at bar; namely, that the Commission in Bates denied that it ever made any promise to the landowners, and there was no evidence of any subsequent ratification. 435 P.2d at 417.

In the instant case, the record abundantly demonstrates that the State Road Commission had the authority to enter into the original agreement with Gorgoza and that it subsequently adopted and ratified the agreement executed by its attorney with full knowledge of the facts. Since each condition is essential to create a contractual obligation which is binding on the State, each will be considered separately.

1. THE STATE ROAD COMMISSION WAS AUTHORIZED TO ENTER INTO THE CONTRACTUAL AGREEMENT WITH GORGOZA AT THE TIME IT WAS MADE.

At the time the original agreement with Gorgoza was made, the State Road Commission enjoyed the following general powers and duties:

The commission shall administer the state highways and exercise those powers and duties which relate to the determination and carrying out of the general policy of the state relating thereto. It shall exercise such control over the location, establishment, changing, construction and maintenance of highways as is provided by law. Utah Code Ann. §27-12-7 (Repl. vol. 1969).

In addition to the above general powers, the Commission was also vested with the following specific powers which are relevant here:

(1) To formulate and adopt rules and regulations and establish programs for the expenditure of public funds for the construction, improvement and maintenance of state highways, and other purposes authorized by law, and for letting contracts for any work which the commission is authorized by law to do.

(2) To determine what portion or portions of any state highway shall be improved at the expense of the state.

(17) To expend sufficient of the funds allocated to the commission to accomplish the purposes of this act. Utah Code Ann. §27-12-8 (Repl. vol. 1969).

Pursuant to the foregoing powers, the Commission was authorized to enter into contracts and written agreements for the construction and maintenance of state highways, Utah Code Ann. §27-12-107 (Repl. vol. 1969), and could be sued on written contracts made by it or under its authority. Utah Code Ann. §27-12-9 (Repl. vol. 1969) (emphasis added). Finally, the State Road Commission was vested with powers of eminent domain for the purpose of condemning rights of way for state highway purposes. Utah Code Ann. §78-34-1 (1953); Barnes v. Wade, 90 Utah 1, 58 P.2d 297 (1936).

Pursuant to the lawful exercise of its eminent domain powers, the State Road Commission, by and through its attorney, entered into an agreement with the plaintiffs to provide reasonable commercial access to Gorgoza's remaining land during the

construction period beginning in 1971. The state's purpose in negotiating the contract was to facilitate the entry of an order of immediate occupancy without expending the time and money required to serve nonresident defendants, wait for a hearing date, and prepare and present evidence of the value of the premises sought to be condemned together with the damages which would result, all in a contested matter. See Utah Code Ann. §78-34-9 (Supp. 1975). Since the agreement was directed solely at facilitating the lawful exercise of the Commission's eminent domain power so that the highway project could be advertised for bid without further delay, (R. 106), it clearly falls within the Commission's broad authority to enter into contracts for "any work which the Commission is authorized by law to do" as set forth above.

2. THE STATE ROAD COMMISSION ADOPTED AND RATIFIED THE AGREEMENT WITH GORGOZA WITH THE SAME EFFECT AS THOUGH PROPERLY EXECUTED IN THE FIRST INSTANCE.

According to the principles of ratification set forth in Williston:

Subsequent affirmance by a principal of a contract made on his behalf by one who had at the time neither actual nor apparent authority constitutes a ratification, and such ratification relates back and supplies original authority to execute the contract.

Ratification need not be express. Any conduct which indicates assent or its equivalent by the purported principal to become a party to the transaction, or by reason of which he has precluded himself from repudiating the transaction done by the purported agent is sufficient. 2 S. Williston, Contracts §278 at 253, 256-58 (3d ed. 1959) (citations omitted).

In the case at bar, the record abundantly demonstrates that the State Road Commission acting through its Department of Highways not only knew of the agreement to provide commercial access to Gorgoza, but also took affirmative steps to begin to carry it out. The record also demonstrates that the Commission has never denied the agreement, but has expressly admitted its existence. The specific facts on which Gorgoza bases its allegation that the Commission ratified the agreement are as follows:

a. Beginning in 1970, Gorgoza officials met with representatives of the State Department of Highways and supplied them with information detailing Gorgoza's need for adequate commercial access during periods of construction. (R. 33-35.)

b. During the spring of 1971, Mr. James Conkling corresponded with the Director of the Department of Highways concerning the access problem. (R. 36-40.) This correspondence culminated on May 29, 1971, with Gorgoza's direct appeal for the State's assurance that adequate commercial access would be provided. (R. 40.)

c. The agreement at issue was negotiated and entered into shortly thereafter. (R. 77.)

d. Gorgoza officials met with the State Highway Engineer on September 28, 1971, at which time further oral

assurances regarding access to the resort were given. (R. 21.)

e. On October 5, 1971, Mr. Conkling again contacted the State Highway Department about its decision to construct an access across Gorgoza's sloping middle entrance rather than across its larger western entrance as agreed. (R. 46, 48.)

f. On or about October 15, 1971, the State Highway Engineer directed the general contractor, W. W. Clyde and Company, to construct an access road across Gorgoza's middle entrance and public funds were expended to accomplish this purpose according to the plans and specifications furnished by the project engineer. (R. 60.)

g. Following Mr. Conkling's notice to the State Highway Department of the unacceptable condition of the newly constructed access road, (R. 50), the State Highway Engineer sent a memorandum to the district engineer reiterating the State's commitment to the agreement as follows:

MEMORANDUM

UTAH STATE DEPARTMENT OF HIGHWAYS

DATE: November 10, 1971

TO : J. Q. Adair, P.E.
District Engineer, District #2

FROM : Blaine J. Kay, P.E.
State Highway Engineer

SUBJECT: Access and Signing for Gorgoza

Officials of Gorgoza have rightly complained that problems in access have seriously hampered their business. They are very concerned about the present

condition of the recently constructed access road and the lack of advance information to the traveling public of this winter-oriented recreational area. I have assured Mr. Jim Conkling, owner, that the approach constructed late this fall will be maintained by the State through the limits of the newly placed gravel. I have also informed him that we will install temporary white on brown signing both east and west (approximately 1500 feet) which will indicate "Recreation Area 1500 Feet". A recent inspection indicates that the approach road is in need of repair; therefore, I would appreciate your early action in making the necessary corrections and provide for the installation of the mentioned signs.

cc: Jim Conkling

(R. 51.)

h. The State Road Commission has never denied the existence of the agreement and has stated on the record that the resulting problems in its implementation were caused by the unreasonable conduct of its general contractor. This position is set forth in the Commission's answers to certain interrogatories propounded by W. W. Clyde and Company:

5. Does the State Road Commission contend that W. W. Clyde and Company deviated in any manner from the plans and specifications, or special orders given to it on the job, for the construction of the approaches, access roads, or highway in the area of the Gorgoza resort?

ANSWER: Yes.

6. If the answer to the previous interrogatory is in the affirmative, state each and every deviation or variance from the plans and specifications or special orders and state the name, address, and position with the State Road Commission of any person having knowledge of any such deviations or variances.

ANSWER: According to the project engineer's diary, the defendant, W. W. Clyde and Company, was directed on or about November 1, 1971, to construct

a temporary approach and to install a drainage culvert to provide safe and easy access to plaintiff's property. This approach was to be a paved surface. As late as November 12, 1971, the approach was not constructed as directed and said defendant's equipment had to be used to pull vehicles out of the approach because of wet conditions caused by inclement weather. The approach was paved on November 15, 1971, according to the project engineer's diary. This defendant considers the delay of the defendant, W. W. Clyde & Company, to be unreasonable. The person having knowledge of these facts is John F. Nye, Project Engineer, Utah State Department of Highways, 2410 West 2100 South, Salt Lake City, Utah. There are possibly other instances where the contractor may have been derelict, but this defendant cannot at this time state that that is the case until all records are reviewed and checked. (R. 72.)

i. The existence of the agreement between Gorgoza and the State Road Commission was admitted by the Commission on April 18, 1974, in its answer to plaintiffs' complaint. In Paragraph 4 of the First Count of plaintiffs' complaint, the following allegation is made:

4. On the 7th day of June, 1971, plaintiffs and defendant State of Utah, by and through its Road Commission, after negotiating the terms thereof, stipulated and agreed to the entry of an Order of Immediate Occupancy by the Fourth Judicial District Court of Summit County, State of Utah, and on said date the Court entered an Order of Immediate Occupancy incorporating the said stipulation and agreement of the parties. A copy of said Order of Immediate Occupancy is attached hereto as Exhibit "A" and by this reference made a part hereof. (R. 1-2.) (Emphasis added.)

Defendant State Road Commission subsequently admitted plaintiffs' allegation in its entirety in Paragraph 3 of the Second Defense of its Answer on file herein:

3. This answering defendant admits the allegations of paragraph 3 and 4 of the First Count of plaintiff's Complaint. (R. 11.)

This binding admission together with the above facts on record herein, make it clear that the State Road Commission has recognized, adopted and taken specific steps to implement the contractual agreement executed by its attorney on June 7, 1971. Indeed the Commission has never denied the existence or terms thereof. Gorgoza contends that such acts and conduct together with the clear evidence of the State's intent as expressed in the written memoranda, answers to interrogatories and admissions on file herein, clearly demonstrate the State Road Commission's adoption and ratification of the agreement of June 7, 1971. Under the authorities cited above, the State's ratification was effective as of the date of the original agreement. See 2 S. Williston, Contracts §278 (3d ed. 1959) The State Road Commission therefore incurred a binding contractual obligation to provide reasonable commercial access to Gorgoza's remaining land as of June 7, 1971.

POINT II

THE STATE'S AGREEMENT MAY NOT BE DISAFFIRMED ON GROUNDS OF GOVERNMENTAL IMMUNITY, SINCE THE LEGISLATURE HAS EXPRESSLY WAIVED THE STATE'S IMMUNITY FROM SUIT BASED UPON THE ALLEGED BREACH OF A CONTRACTUAL OBLIGATION.

The State argued below that plaintiffs' action was barred by governmental immunity. (R. 110-111.) Gorgoza

contends that the lower court erred in ruling on this question, specifically by entering its fourth conclusion of law to the effect that the negotiation and execution of the agreement by the State's attorney constituted a waiver of governmental immunity which was invalid. (R. 131.)

The express provision of the Utah Governmental Immunity Act relied on by plaintiffs reads as follows:

Immunity from suit of all governmental entities is waived as to any contractual obligation. Utah Code Ann. §63-30-5 (Repl. vol. 1968).¹

In the case at bar, the State Road Commission has admitted that it entered into an agreement with the plaintiffs, the terms of which were incorporated in the order of immediate occupancy entered June 7, 1971. (R. 1-2; 11.) Furthermore, even if the Commission's attorney were not authorized to enter into this agreement in the first place, the Commission later ratified the agreement by its subsequent acts and admissions which ratification related back to and supplied the original authority to contract. 2 S. Williston, Contracts §278 (3d ed. 1959). Defendant State Road Commission thereby incurred an express contractual obligation to the plaintiffs as of June 7, 1971, which is enforceable in an action for damages under the express provisions of the Act itself.

¹The statutory provision cited above was in effect during the period of time in which the factual events pertaining to this case took place. The section has since been amended. See Utah Code Ann. §63-30-5 (Supp. 1975).

In three recent cases, this court has considered the question of impairment of access to property in view of the Utah Governmental Immunity Act. In Boyce v. State Road Commission, 26 Utah 2d 138, 486 P.2d 387 (1971), the plaintiff brought an action for damages to property, the access to which had been allegedly destroyed by a state road construction project. 486 P.2d at 388. The basis of plaintiff's claim was that certain agents of the State misrepresented to him that the construction project would not injure or impede access to his property. Id. This court upheld the State's claim of immunity on the grounds that plaintiff's suit was barred by the express provisions of Utah Code Ann. §63-30-10(6) (Repl. vol. 1968) which prohibits suits against the State arising "out of a misrepresentation" made by a state employee. Id.

The Boyce case is clearly distinguishable from the facts at issue here. While in Boyce, the case turned upon an alleged misrepresentation made by agents of the State, such was never the case in Gorgoza. On the contrary, Gorgoza's claim is that an express contractual agreement, adopted and acted upon by the State, was breached in that reasonable commercial access was not provided as agreed. The State in Gorgoza has not even alleged that any misrepresentations were involved. Thus the statutory provision under which plaintiffs' claim was barred in Boyce is irrelevant to the consideration of the plaintiffs' claim in Gorgoza.

In another case brought to recover damages caused by reason of the construction of a highway which impaired access to property, the plaintiffs did not contest the validity of those cases holding that in the absence of a taking of property there can be no recovery against the State for damages due to the impairment of access to property, but contended that the provisions of the Governmental Immunity Act, Utah Code Ann. §63-30-6 (Repl. vol. 1968) should be construed as affirmatively permitting the maintenance of such action. Holt v. Utah State Road Commission, 30 Utah 2d 4, 511 P.2d 1286, 1287 (1973).

The statutory provision in question reads as follows:

Immunity from suit of all governmental entities is waived for the recovery of any property real or personal or for the possession thereof or to quiet title thereto, or to foreclose mortgages or other liens thereon or to determine any adverse claim thereon, or secure any adjudication touching any mortgage or other lien said entity may have or claim on the property involved.

In construing this section in light of plaintiffs' claims, the court strictly applied the Act and held that the above section was not to be construed so as to include damage actions of this character. It should be clearly noted, however, that no allegation of any contractual obligation on the part of the State was considered by the court in this case.

The third opinion was handed down by this court in the case of Bailey Service & Supply Corp. v. State Road Com-

mission, 533 P.2d 882 (Utah 1975). In that case, the State appealed from a judgment awarding damages to the plaintiff arising out of the erection of a viaduct on Fourth South Street in Salt Lake City. 533 P.2d at 883. Part of the court's opinion in that case is instructive here:

Early in the proceedings the State Road Commission entered into a stipulation with the plaintiff which purported to waive governmental immunity. The stipulation was disavowed, and the State defended on the ground that the State was immune from suit. Only the legislature can waive sovereign immunity and the Road Commission's attempt to do so was without legal effect. The trial court did not base its (sic) decision upon the ground that governmental immunity had been waived but rather upon the court's determination that there was a "taking" by reason of the interference with the right of access.

The Bailey case is distinguishable from the case at bar at several critical points:

1. The stipulation itself purported to waive governmental immunity in contravention of the express terms of the Act;

2. The stipulation was disavowed by the State.

In the instant case, plaintiffs contend that the State of Utah adopted and ratified and thereby rendered binding the contractual agreement with plaintiffs the terms of which were incorporated into the order of immediate occupancy entered on June 7, 1971. Thus the agreement in this case does not involve any "purported waiver" of immunity as was referred to in Bailey, but a transaction which falls squarely within the express waiver provisions of the Act itself. Furthermore, the state has not

disaffirmed the agreement, but has admitted its existence, acted pursuant to its terms, and affirmed its intention to be bound thereby. The State has incurred a binding contractual obligation and should not be allowed to disaffirm it on the basis of authorities which are silent regarding the specific issue at bar.

POINT III

THE STATE'S AGREEMENT MAY NOT BE DISAFFIRMED ON THE GROUNDS THAT TEMPORARY OBSTRUCTION OF COMMERCIAL ACCESS IS NONCOMPENSABLE, SINCE THE BASIS OF THE PLAINTIFFS' CLAIM IS THAT THE STATE ACTED UNREASONABLY IN BREACHING ITS CONTRACT WITH GORGOZA.

The State argued below that accepted principles of eminent domain deny recovery for damages sustained for temporary or permanent impairment of access. (R. 108.) Gorgoza's position is that this general statement of eminent domain law is subject to clear exception in the case of unreasonable acts by the condemnor, which exception is fully applicable here. Gorgoza therefore submits that the lower court erred in entering its fifth conclusion of law which sets forth the general rule, but fails to apply the relevant exceptions. (R. 131.)

According to the general rule set forth in 2A Nichols, Eminent Domain §6.4442[2] (rev. 3d ed. 1975),

When a street is so obstructed during the construction of a public work that access to abutting property is wholly cut off, the fact that the injury is only temporary is generally held to be no reason for denying the owner compensation. However, when access, though ren-

dered difficult and inconvenient, is not wholly cut off, the owner is denied compensation. This is so even if there is such an injury to the use of the property for business purposes during the construction of the work as to materially affect the value of the leasehold interests, and this injury is due to the presence of structures in the street that would undoubtedly constitute a ground for compensation if they were maintained there permanently.

This general rule is subject to clear exception, however, in cases of negligence, unreasonable, unnecessary, arbitrary or capricious acts by the condemnor. Id., citing Hadfield v. State, 86 Idaho 561, 388 P.2d 1018 (1964); Department of Public Works v. Ayon, 54 Cal.2d 217, 352 P.2d 519 (1960).

The "unreasonable interference" exception cited above has been recognized in the decisions of this court. In the case of Springville Banking Co. v. Burton, 10 Utah 2d 100, 349 P.2d 157 (1960), plaintiff brought a mandamus action to compel members of the State Road Commission to initiate eminent domain proceedings to assess damages allegedly caused by impairment of ingress to and egress from the plaintiff's property. 349 P.2d at 157-58. In discussing the question whether plaintiff's damages were compensable, the court made the following statement:

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. On the other hand, if public officials act arbitrarily and unreasonably, causing, for example, total destruction of the means to get in and out of one's property, without any reasonable justification for doing so in the public interest, in a manner that imposes a special burden on one not shared by the public generally, principles of equity no doubt could be invoked to prevent threatened action of such character or to remove any instrumentality born of such conduct. Plaintiff did not allege or assert anything akin thereto. 349 P.2d at 158-59. (Emphasis added.)

In the instant case, plaintiffs alleged that defendant State Road Commission violated its contractual obligation to provide plaintiffs and the general public with reasonable access to Gorgoza's remaining property. (R. 2.) The state subsequently took the position that its general contractor acted unreasonably in delaying proper construction of the access road until on or about November 15, 1971, (R. 72), after Gorgoza had been forced to abandon its operations. (R. 52.) Thus the interference involved here was of such a nature that it would fall into the "unreasonable interference" category which clearly supports a claim for damages under accepted principles of eminent domain law as recognized by this court.

Under the authorities cited above, even in the absence of contract, a landowner may recover damages for temporary obstruction of commercial access if the obstruction is of an unreasonable, unnecessary, arbitrary or capricious nature. Plaintiffs contend that rather than affording defendant State Road Commission grounds for disaffirming its contract, the above line of authority supports plaintiffs' claim for damages

based on unreasonable and unnecessary conduct i.e., a material breach of a binding contractual obligation in the absence of legal excuse for nonperformance.

POINT IV

EVEN ASSUMING ARGUENDO THAT THE STATE'S CONTRACTUAL OBLIGATION MAY BE DISAFFIRMED, THE LOWER COURT NEVERTHELESS ERRED IN DISMISSING PLAINTIFFS' COMPLAINT IN ITS ENTIRETY, SINCE CONTROVERTED ISSUES OF MATERIAL FACT STILL EXIST BETWEEN THE PARTIES

In the second count of their complaint, plaintiffs' alleged that defendant State Road Commission acting through its duly authorized agents and employees negligently created a "defective, unsafe and dangerous condition of a highway, structures and other public improvements of the State of Utah," all to the plaintiffs' damage. (R. 3.) These allegations were subsequently denied by the State. (R. 12.) Although both Gorgoza and the State Road Commission only moved the court for summary judgment on the sole issue whether the State had incurred a binding contractual obligation as alleged in the first count of plaintiffs' complaint, (R. 119-20; 128-29), the lower court nevertheless dismissed both counts of plaintiffs' complaint as follows:

That plaintiffs' Complaint be dismissed with prejudice on the grounds and for the reason that defendant, State Road Commission, is entitled to summary judgment in that there is no binding agreement or enforceable contract existing between the parties as alleged by plaintiff and the State has not, therefore, waived its immunity from suit in an action of this kind. (R. 133.)

Plaintiffs contend that the lower court erred in entering the above judgment of dismissal together with its eighth conclusion of law on which such judgment of dismissal was based. (R. 131.)

In rendering summary judgment for defendant State Road Commission, the lower court adopted and incorporated the stipulation of the parties concerning facts as its findings of fact and made and entered its conclusions of law based thereon. (R. 130.) No additional evidence was presented by affidavit or otherwise, and no other findings of fact whatsoever were made. Since the stipulation of facts submitted by the parties was limited solely to those facts relevant to the contract issue before the court, it included no facts directly bearing on the negligence issue raised in the second count of plaintiffs' complaint. As a result, the court did not make and enter a single conclusion of law bearing on plaintiffs' second count except conclusion of law number 8 which held that defendant was entitled to a judgment of dismissal pursuant to Rule 56 of the Utah Rules of Civil Procedure. (R. 131.)

This court has held on numerous occasions that summary judgment is properly granted only in cases in which there is no dispute as to any issue which is material to the settlement of the controversy. Holbrook Company v. Adams, 542 P.2d 191 (Utah 1975); Burningham v. Ott, 525 P.2d 620 (Utah 1974). If there are controverted facts at issue, there is an issue that is genuine,

and a motion for summary judgment should not be granted. Trone v. Pacific Wholesale Supply Co., 534 P.2d 895 (Utah 1975). The court may, however, render summary judgment on part of the case where appropriate. Utah R. Civ. P. 56(d).

In the case at bar, the court was requested by all parties to render summary judgment solely on the contract issue raised in the first count of plaintiffs' complaint. Neither side submitted affidavits or any other evidence bearing on the negligence count for the court's consideration. Since plaintiffs' allegations regarding defendant State Road Commission's negligence in creating a defective and unsafe condition on the access road were denied in defendant's answer (R. 12), controverted facts remain at issue between the parties. The lower court therefore erred in rendering judgment on the whole case and should be reversed.

CONCLUSION

According to Utah Code Ann. §27-12-9 (Repl. vol. 1969), the State Road Commission may be sued on written contracts made by it or under its authority. Furthermore, the Utah Governmental Immunity Act expressly waives immunity from suit based on the alleged breach of a contractual obligation. Utah Code Ann. §63-30-5 (Repl. vol. 1968). Plaintiffs contend that the stipulation of facts, answers to interrogatories and admissions on file herein make it clear that the State Road

Commission incurred such a contractual obligation when it ratified the agreement of its attorney, and that no valid grounds for disaffirming the contract exist. Furthermore, even if such grounds did exist, the lower court nevertheless erred in dismissing the whole case when controverted issues of material fact still exist between the parties. The judgment of the lower court should therefore be reversed and the case remanded for trial on its merits.

Respectfully submitted.

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