

1988

# Golding v. Ashley Central Irrigation Company : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

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DOCKET NO

880025

IN THE SUPREME COURT OF THE STATE OF UTAH

GERALD GOLDING, Individually,  
and as representative of the  
heirs of RANDAL GOLDING,  
deceased,

Plaintiff-Respondent,

vs.

ASHLEY CENTRAL IRRIGATION  
COMPANY, a Utah corporation,

Defendant-Appellant.

Case No. 880025

BRIEF OF APPELLANT

On Appeal From the Seventh Judicial District Court  
Of Uintah County  
The Honorable Dennis L. Draine, District Judge

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GERALD GOLDING, Individually,  
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heirs of RANDAL GOLDING,  
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**vs.**

**Defendant-Appellant.**

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### STATUTES

Utah Code Ann. Section 57-14-1 et seq. . . . .	1, 2, 3, 6, 11
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### OTHERS

Utah Rule of Civil Procedure 12(c) . . . . .	2, 5, 6, 7, 10, 11
Utah Rule of Civil Procedure 56 . . . . .	2, 5, 7, 9, 11



DETERMINATIVE STATUTORY PROVISIONS

Utah Rule of Civil Procedure 12(c):

Motion for Judgment on the pleadings. After the pleadings are closed but within such time as to not delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. (Emphasis added.)

Utah Rule of Civil Procedure 56(b):

Summary Judgment for defending party. A party against whom a claim, counter-claim or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

Utah Rule of Civil Procedure 56(c):

Motion and proceedings thereon. . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. .

Utah Code Annotated Section 57-14-3:

Except as specifically provided in subsections (1) (2) of Section 57-14-6, an Owner of Land owes no duty of care to the premises for safe entry or use by any person using the premises for any recreational purpose, or to give any warning of a dangerous condition, use, structure, or activity on those premises to those persons.

Utah Code Annotated Section 57-14-6(a):

Nothing in this act limits in any way any liability which otherwise exists for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity or for deliberate, willful, or malicious injury to persons or property . . .

STATEMENT OF THE CASE

Nature of the Case

This is an appeal from the trial Court's order granting Judgment on the Pleadings in favor of Defendant and dismissing Plaintiff's complaint. Though the Order of the Court was called "Judgment on the Pleadings" it is apparent from the procedure that this characterization was erroneous, and that the Order granted was actually in the nature of a Summary Judgment.

Course of Proceedings

Plaintiff's wrongful death action was filed on or about June 19, 1987. The basis for Plaintiff's claim was that Randal Golding had drowned in Defendant's irrigation canal, and that Defendant had acted wrongfully in not warning or guarding against the condition in the canal which led to Randal Golding's death. Defendant filed a Motion and Memorandum for Judgment on the Pleadings claiming that Utah Code Annotated Section 57-14-1, et seq. barred any recovery by Plaintiff in the absence of willful or malicious conduct on Defendant's part. Subsequent memoranda on this issue were filed by counsel for both Plaintiff and Defendant. On December 17, 1987, the Trial Court's Minute Entry granting Defendant's Motion for Judgment on the Pleadings was signed.



### Facts

On June 25, 1986, Randal Golding, a seventeen year old boy, and some teenage friends decided to go swimming in the irrigation canal owned by Defendant. While swimming in this irrigation canal, one of Mr. Golding's friends went over a spill-way and became entrapped in the backwash created at the bottom of the spill-way. Randal Golding, seeing the desperate plight of his friend, jumped into the water in an effort to save his friend. Mr. Golding was successful in this attempt, and his friend was able to swim out of the backwash to safety. Unfortunately, Mr. Golding then became trapped in the backwash himself and subsequently drowned.

Defendant maintained no barricades, fences or other guards which would protect individuals such as Randal Golding from entering the irrigation canal or from going over the spill-way or entering into the area of the backwash created by the spill-way. Likewise, Defendant maintained no signs warning individuals such as Randal Golding of the dangers of entering into the irrigation canal, going over the spill-way, or entering the backwash created by the spill-way.

The Complaint was filed by the personal representative of Randal Golding's estate, alleging that Defendant's wrongful actions in maintaining the canal had led to the death of Randal Golding. Defendant filed a Motion for Judgment on the Pleadings and Memorandum in Support Thereof alleging that, under the provisions of Utah Code Annotated Section 57-14-1, et seq., no

cause of action could be maintained against Defendant in the absence of willful or malicious conduct on Defendant's part. Plaintiff filed a responsive memorandum arguing that there was willful and malicious conduct on the part of the Defendant in failing to guard or warn against the dangers in Defendant's canal and spill-way. Plaintiff specifically requested further time to conduct discovery on this issue and to file affidavits in accordance with Rule 56(f) of the Utah Rules of Civil Procedure. (Plaintiff's Memorandum in Opposition to Motion for Judgment on the Pleadings pages 8-9.)

The Court did not exclude Plaintiff's arguments alleging willful and malicious conduct on Defendant's part, but nevertheless entered an order granting Defendant's Motion for Judgment on the Pleadings.

#### Summary of Arguments

1. The Motion for Judgment on the pleadings was transformed into a Motion for Summary Judgment by arguments of counsel relating to matters outside the pleadings, which arguments were not excluded by the Court. U.R.C.P. 12(c).

2. The Court's dismissal of Plaintiff's Complaint in this summary nature was inappropriate under either the standards governing judgment on the pleadings, or standards governing summary judgment. U.R.C.P. 12(c); 56(c).

3. Plaintiff alleged items, in both the Complaint and in the memorandum opposing the Motion for Judgment on the Pleadings which, if proven, would establish that Defendant was

guilty of willful and malicious conduct leading to the death by drowning of Randal Golding.

ARGUMENT

POINT I

THE COURT SHOULD HAVE TREATED  
DEFENDANT'S MOTION AS A MOTION FOR  
SUMMARY JUDGMENT.

Rule 12(c) of the Utah Rules of Civil Procedures states that a Motion for Judgment on the Pleadings is to be treated as a Motion for Summary Judgment if matters outside the pleadings are presented to and not excluded by the Court. In such event, the parties are to be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Defendant's Motion alleged, and the Court apparently agreed, that Plaintiff's complaint contained no allegation of willful and malicious conduct on the part of Defendant such that the exceptions contained in Section 57-14-6(1) would apply. Plaintiff's responsive memorandum contained a section alleging willful and malicious conduct on the part of Defendant and specifically requesting additional time to more fully pursue this issue through discovery, through the filing of affidavits and through amendment of the Complaint if necessary. The Court did not exclude these arguments of Plaintiff, but merely ruled in its Minute Entry dated December 17, 1987, "that there is no allegation or evidence of willful or malicious failure to guard or warn against any condition existing in, on or about the canal." (Emphasis added.)

Rule 12(c) is very clear that when additional evidence outside the pleadings is introduced and not excluded, the Court shall treat a Rule 12(c) motion as a motion for Summary Judgment. Furthermore, the Court shall allow all parties reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Despite the claims of Plaintiff's attorney that affidavits could be supplied evidencing willful and malicious conduct, and the pleas of Plaintiff's attorney that additional time be granted to collect necessary information to supply such affidavits, the Court ignored the clear mandate of Rule 12(c) and Rule 56 in granting Defendant's Motion for Judgment on the Pleadings. Such action was clearly erroneous and the case should be remanded to the Trial Court to allow Plaintiff to introduce the evidence which is available to support the assertions that there was willful and malicious conduct on the part of the Defendant.

#### POINT II

#### THE DISMISSAL OF PLAINTIFF'S COMPLAINT WAS ERRONEOUS UNDER RULE 12(C)

The Trial Court ruled that there was no allegation of willful or malicious conduct contained in Plaintiff's complaint. This ruling was erroneous.

Paragraph 11 of the Complaint stated, "Defendant breached the duty of care owed to Plaintiff . . . in at least the follow (sic) particulars:

. . .

(b) In failing to properly secure areas of extreme danger;

(c) In failing to post appropriate warnings to the public of the extreme danger surrounding its water ways, canals, ditches and spill-ways;

. . .

(e) In failing to take reasonable action to protect the public in the face of knowledge and information that its canals, ditches, spill-ways and water-ways were unreasonably dangerous to life and limb . . . (Emphasis added.)

The above allegations, if proven, would support a claim on Plaintiff's part that Defendant was guilty of willful and malicious conduct. Of particular importance is paragraph 11(e) which states that Defendant knew that its canal was unreasonably dangerous to life and limb, and yet took no action to warn the public or otherwise protect the public from the dangers which it knew to exist. Various Courts have held that an intentional lack of regard concerning the safety of others, or a willful disregard of what one knows to be his duty, is the equivalent of "willful and malicious" misconduct.

In Wasson v. SEC, 558 F.2d 879, 887, (8th Cir. 1977) the Court held that one is guilty of a "willful" violation of the Securities laws when he or she proceeds in disregard of or reckless indifference to a known obligation. In Salas v. Industrial Commission, 564 P.2d 1119, 1121 (Utah 1977) the Court

discussed the term "willful" in the workman's compensation statute and implied that failure to take action in the face of notice that an actual or potential hazard existed, is a "willful" failure to act. The Court in that case also equated "willful" with the omission to act in reckless disregard for the safety of others. Finally, in Sorenson v. U.S., 521 F.2d 325, 329 (9th Cir. 1975) the Court held that one who deliberately closes his or her eyes to information which would disclose a duty to act, is guilty of "willful" misconduct as that term is used in Section 6672 of the Internal Revenue Code.

The Complaint alleges that Defendant knew or at least had access to information that there was an unsafe condition in its canal and that, at the very least, warning signs should be posted. In spite of this knowledge, the Defendant did nothing. Thus, the Complaint alleges facts which, if proven, would establish "willful and malicious" conduct on the part of Defendant. It was therefore error to grant a Motion for Judgment on the Pleadings.

Admittedly, the only cause of action contained in the Complaint was one entitled "Negligence". However, when the body of a document is in conflict with the titles or headings of the document, the wording in the body takes precedence. Lund v. Third Dist. Ct., 62 P.2d 278, 280 (Utah 1936); Kimberly v. DeWitt, 606 P.2d 612, 614 (Okla. 1980)

### POINT III

THE DISMISSAL OF THE COMPLAINT  
UNDER THE STANDARDS OF RULE 56 WAS  
CLEARLY ERRONEOUS.

Plaintiff's Memorandum in Opposition to Defendant's Motion for Judgment on the Pleadings very specifically alleged that information could be obtained regarding Defendant's knowledge of unsafe conditions in the canal. Plaintiff's memorandum further requested time to develop this information through discovery and affidavits.

The fact that extraneous arguments were considered and not excluded by the Court transformed Defendant's Motion from one for Judgment on the Pleadings into one for Summary Judgment. [U.R.C.P. 12(c)] The standard for granting a Motion for Summary Judgment, which is well known, is that there must be no material issue of fact. [U.R.C.P. 56(c); Jackson v. Dabney, 645 P.2d 613, 615 (Utah 1982)]

Plaintiff's Memorandum and Complaint both alleged that Defendant knew of the unsafe nature of its canal and spill-way and yet took no action to warn or protect the public. Such inaction in the face of knowledge is justifiably characterized as willful and malicious. Plaintiff should have been given the opportunity to present affidavits and other evidence in support of its claims in this regard. Indeed, Rule 12(c) very clearly states that when a Motion is transformed into one for Summary Judgment "all parties shall be given reasonable opportunity to present all material pertinent to such a Motion by Rule 56." Had

the trial court acted properly and allowed Plaintiff to submit his affidavits, there would have been factual issues raised barring Summary Judgment.

CONCLUSION

Plaintiff's Complaint and Memorandum contained allegations which, if proven, would establish the existence of willful and malicious conduct on the part of Defendant. Utah Code Annotated Section 57-14-6(1) specifically states that a landowner may be liable for willful and malicious failure to guard or warn against a dangerous condition which results in the death or injury of another party. It was therefore error for the Trial Court to grant judgment in Defendant's favor under either Rule 12(c) or Rule 56.

RESPECTFULLY SUBMITTED this \_\_\_\_\_ day of May, 1988.

ASHTON, BRAUNBERGER, POULSEN  
& BOUD, P.C.

---

Richard I. Ashton  
David A. Wilde



CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the foregoing BRIEF OF APPELLANT was mailed, postage prepaid, to the following this 3 day of May, 1988.

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