1988

Gerald Golding v. Ashley Central Irrigation Company : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

GERALD GOLDING, individually, and as representative of the heirs of RANDAL GOLDING, deceased, Plaintiff/Appellant, ASHLEY CENTRAL IRRIGATION COMPANY, a Utah corporation, Defendant/Respondent.	Case No. 880025 Category No. 14b

REPLY BRIEF

Appeal from the Seventh Judicial District
Court of Uintah County, State of Utah
The Honorable Dennis L. Draney, Judge.

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The Brief of Respondent contains several items which Appellant will reply to in this brief. These items are as follows:

I.

LOVELAND v. OREM CITY, 746 P.2d 763 (UTAH 1987) AND OTHER SIMILAR DECISIONS DO NOT BAR PLAINTIFF'S APPEAL, AND IN FACT SUPPORT THIS APPEAL.

In Point One of Defendant's Brief, Defendant alleges that Plaintiff is not entitled to relief in this case under the doctrine stated in the cases of Loveland vs. Orem City Corp., 746 P.2d 763 (Utah 1987); Trujillo vs. Brighton Northpoint Irrigation Company, 746 P.2d 780 (Utah 1987); Brinkerhoff vs. Salt Lake City, 371 P.2d 211 (Utah 1962) and Charvoz vs. Salt Lake City, 131 P.2d 901 (Utah 1913). This is the same argument that Defendant made in its Motion for Summary Disposition dated February 11, 1988, and which argument has previously been

rejected by this Court.

The only applicability of the Loveland and Trujillo cases to this case is that in each of those cases the Supreme Court specifically stated that it is the responsibility of local governments to enact laws determining where and how protective measures are to be taken by canal owners. Inasmuch as the issue in the present case involves a statute enacted by the State Legislature (Utah Code Ann. Section 57-14-6) relating to responsibilities of canal owners for the safety of others it is entirely appropriate and desirable that this Court determine the applicability of the statute to the facts of this case.

II.

PLAINTIFF'S COMPLAINT CONTAINED ALLEGATIONS OF WILLFUL MISCONDUCT ON DEFENDANT'S PART.

Defendant's Brief states in at least two places that the Complaint filed by Plaintiff alleges no willful misconduct on the part of Defendant. This allegation is false. The Complaint did contain allegations which, if proven, would amount to "willful misconduct" as that term has been defined by numerous courts. Indeed, even by the authorities cited in Defendant's own Brief, Plaintiff's Complaint contains allegations establishing willful misconduct on the part of Defendant. For example, Defendant's Brief refers to the case of Ewell vs. United States, 579 F.Supp. 1291 (D. Utah 1984) aff'd 776 F.2d 246 (10th Cir. 1985) which defines "willful misconduct" as "the intentional failure to do an act with the knowledge that serious injury is the probable result." Compare this definition with the

allegation in paragraph 11(e) of Plaintiff's Complaint which states that Defendant failed "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. . ."

If Defendant knew of the dangerous condition which existed on its property as the Complaint alleges, and if the Defendant failed to take any action to warn others about those dangers as the Complaint also alleges, then such failure to warn constitutes "willful misconduct" in accordance with the authorities cited in the Briefs of both Plaintiff and Defendant filed with this Court. Therefore, it was clearly erroneous for the Trial Court to grant a Motion for Judgment on the Pleadings when the pleadings contained statements alleging willful misconduct on Defendant's part.

III.

PLAINTIFF'S BRIEF DOES NOT ASK LEAVE TO FILE AN AMENDED COMPLAINT.

Defendant's Responsive Brief contains statements to the effect that Plaintiff has admitted that his Complaint was insufficient and has asked for an extension of time to gather facts to support an Amended Complaint. This statement is again false.

Review of Plaintiff's Brief on Appeal shows that there is no statement admitting insufficiency of the Complaint. Indeed, Plaintiff's Brief states emphatically in both Point Two and Point Three that the Complaint on its face is sufficient to

withstand a Motion for Judgment on the Pleadings. Plaintiff's Brief on Appeal contains no statement or request indicating the need for filing an Amended Complaint. The only items referred to in Plaintiff's Brief relating to a need to file additional documents are in regards to Plaintiff's request to the Trial Court that additional time be allowed to pursue discovery and file affidavits which would support the claims of willful misconduct on the part of the Defendant contained in the Complaint.

Plaintiff's request to both the Trial Court and this Court that additional time be granted to pursue discovery and file supporting affidavits are entirely appropriate. In a case very similar to this, Strand vs. Associated Students of the University of Utah, 561 P.2d 191, (Utah 1977) this Court held that a judgment granting the Defendant's Motion to Dismiss Plaintiff's Complaint was erroneously entered. In that case the Court noted that Plaintiff's Complaint was filed on February 13, 1976 and a Motion to Dismiss filed on March 9, 1976. Thereafter, an affidavit in Defendant's behalf was filed supporting Defendant's Motion to Dismiss. The Trial Court granted the Motion to Dismiss on March 30, 1976.

The Supreme Court noted that the Motion to Dismiss was properly considered a Motion for Summary Judgment inasmuch as materials outside the pleadings had been considered by the Court. The Court further noted that Plaintiff's attorney had submitted documents in response to the Motion to Dismiss requesting

additional time within which to pursue discovery. These documents further stated that Plaintiff was unable to adequately respond to Defendant's Motion without being allowed further time to pursue discovery.

The Supreme Court held that when a Motion to Dismiss is transformed into a Motion for Summary Judgment:

> . . .the mandatory provision of Rule 12(b) controls (and) all parties must be given adequate notice and opportunity to submit supporting materials, particularly the party against whom Summary Judgment is entered.
>
> It is error to consider a Motion to Dismiss as a Motion for Summary Judgment without giving the adverse party an opportunity to present pertinent material. (Id. at 193, Emphasis added.)

On the basis of the above, the Supreme Court determined that the Trial Court's grant of Defendant's Motion was an abuse of discretion, and therefore remanded the case to the trial court with instructions that Plaintiff be allowed reasonable opportunity to conduct depositions and engage in other discovery. (Id. at 194.)

CONCLUSION

Defendant's Responsive Brief contains several statements tending to confuse the issues raised by Plaintiff on appeal. Plaintiff's position before this Court has always been that the Complaint on its face was sufficient to withstand a Motion for Judgment on the Pleadings and, further, that the Motion for Judgment on the Pleadings was transformed into a Motion for Summary Judgment whereby Plaintiff should have been

granted reasonable opportunity to pursue reasonable discovery and supply affidavits and other evidence which would support Plaintiff's position. Previous decisions of this Court support this position.

DATED this 15th day of June, 1988.

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

By _____
Richard I. Ashton
David A. Wilde

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the foregoing REPLY BRIEF was mailed, postage prepaid, to the following this _____ day of June, 1988.

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