

1981

Minnie H. Thomas v. Clearfield City, A Municiple Corporation : Brief of Respondent

Utah Supreme Court

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Recommended Citation

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IN THE SUPREME COURT OF THE
STATE OF UTAH

-----oOo-----
MINNIE H. THOMAS,

Plaintiff
and Appellant,

vs.

CLEARFIELD CITY,
A Municipal Corporation,

Defendant
and Respondent.
-----oOo-----

CASE NO. 17338

BRIEF OF RESPONDENT

Appeal from the Judgment of the Second Judicial
District Court of Utah Davis, State of Utah
THE HONORABLE J. DUFFY PALMER
DISTRICT COURT JUDGE

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FILED

FEB 27 1981

Clark, Supreme Court, Utah

TABLE OF CONTENTS

STATEMENT OF THE NATURE OF THE CASE	1
DISPOSITION IN THE LOWER COURT	1
RELIEF SOUGHT ON APPEAL	1
STATEMENT OF FACTS	2
ARGUMENT	2
POINT I.	
THE DOCTRINE OF GOVERNMENTAL IMMUNITY SHOULD APPLY IN THE INSTANT CASE	2
CONCLUSION	7

TABLE OF AUTHORITIES

CASES CITED

<u>Cobia vs. Roy City</u> 12 Ut2d 375, 366 P2d 986 (1961)	6
<u>Standiford vs. Salt Lake City Corporation</u> 605 P2d 1230 (1980)	2
<u>State Water Pollution Control Board vs. Salt Lake City</u> 6 Ut2d 247, 311 P2d 370 (1957)	5

REFERENCES

<u>Utah Code Annotated</u> Section 10-8-38	3
<u>Utah Code Annotated</u> Section 10-7-14.1	4-5
<u>Utah Code Annotated</u> Section 78-34-1(9)	4
<u>Utah Code Annotated</u> Section 63-30-3	6
<u>Utah Code Annotated</u> Section 63-30-10	6-7
<u>Utah Code Annotated</u> Section 63-30-1, et seq	7
<u>Utah Code Annotated</u> Section 63-30-10(4)	8

IN THE SUPREME COURT OF THE
STATE OF UTAH

-----oO-----	
MINNIE H. THOMAS,	:
	:
Plaintiff and	:
Appellant,	:
vs.	:
	Case No. 17338
CLEARFIELD CITY,	:
A Municipal Corporation,	:
	:
Defendant and	:
Respondent.	:
-----oO-----	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant filed a Complaint for damages against the Respondent upon the basis of negligence in maintaining a sewer and water disposal system.

DISPOSITION IN THE LOWER COURT

The Lower Court granted Summary Judgment to the Respondent barring Appellant's claim under the Utah Governmental Immunity Act.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the Summary Judgment granted by the Lower Court finding that Appellant's Cause of Action is barred by the Utah Governmental Immunity Act.

STATEMENT OF FACTS

Respondent agrees with the Statement of Facts set forth in Appellant's brief.

ARGUMENT

POINT I.

THE DOCTRINE OF GOVERNMENTAL IMMUNITY SHOULD APPLY IN THE INSTANT CASE.

The Utah Supreme Court in Standiford vs. Salt Lake City Corporation, 605 P.2d 1230 (1980), clearly broadened and expanded governmental liability. While the Court rejected the historical determination of governmental immunity based upon a finding of governmental vs. proprietary function, it did still acknowledge that there are governmental functions that need to be carried out for the benefit of the people as a whole, and to enable these functions to be performed, they must be protected by governmental immunity.

At page 1236 in the Standiford case, the Court stated:

"We therefore hold that the test for determining governmental immunity is whether the activity under consideration is of such a unique nature that it can only be performed by a governmental agency, or that it is essential to the core of governmental activity."

In establishing a test, it is obvious that the Court is saying that some governmental activity should have immunity from Court liability. The pendulum has not been pushed to the point that there is no governmental immunity from tort liability. The test set forth by the Court still must be

judiciously applied to the factual circumstances of the individual case.

The question in the instant case then is whether the operation of a sanitary sewer by a governmental agency, (Clearfield City) is of such a unique nature that it can only be performed by a governmental agency, or is essential to the core of governmental activity. Naturally, it is the position of the Respondent that this activity does fall within the purview of the test and thus is protected by governmental immunity.

The very core of governmental responsibility and activity is to provide services to citizens which will protect them from harm and danger and help them live wholesome, healthy and peaceful lives. Providing sanitary sewer services for residents would have to be considered of prime importance in this regard. If this responsibility were neglected, chaos would result.

The Utah State Legislature has granted specific authority to governmental agencies, giving them the power and responsibility to provide sanitary sewer systems within their respective jurisdictions.

In Section 10-8-38, UCA, 1953, as amended, Cities and Towns are given specific powers and duties to construct, maintain and operate sewer systems. To defray the cost of constructing, maintaining or operating any sewer system, any City or Town may require mandatory hook-up and make a reasonable charge for the use thereof. To enforce the mandatory hook-up,

the City or Town may shut off the water supply to an occupant.

In Section 10-7-14.1, UCA, 1953, as amended, the State Legislature made a Declaration of Public Policy indicating that the purification of drinking water and the treatment of raw sewage are important to public health and welfare. This Section states in part:

"...it is hereby declared to be the public policy of this state to grant the privilege to municipalities to raise funds to improve the aforementioned health standards, to encourage the municipalities to provide that no waste shall be discharged into any waters of the state of Utah without first being given proper treatment, to provide for the treatment of water to be used for drinking purposes to protect the health of the citizens and to give municipalities the discretion to determine the priority of development of the facilities directed toward the elimination of health hazards and pollution of public waters. The construction of the facilities herein mentioned shall be given an early priority in those areas where the present welfare of the people is endangered by the lack of such facilities."

In Section 78-34-1(9), the Legislature has given governmental entities the power of eminent domain to acquire property rights for sewerage purposes.

Appellant argues that furnishing sewer disposal to residents is not of such a unique nature that it can only be performed by a governmental agency. This argument could be pushed to the ridiculous. Actually if we all lived in a Utopia and each citizen did exactly what was for the good of society, we would have no need for any government. Everything could be done without benefit of any governmental agency. But in all reality, we haven't yet arrived. If we are going to achieve the Public

policy declared in 10-7-14.1, UCA, and insure that our citizens have pure drinking water, and that raw sewage is properly treated throughout the entire state, these services must in all reality be provided by governmental agencies.

The power and authority conferred upon Cities and Towns, as cited above, enable Cities and Towns to condemn property by eminent domain to enable them to construct and operate sewer systems. To ensure proper health and welfare to citizens and to provide pure drinking water and proper treatment of raw sewage, Cities and Towns can require citizens to connect to the sewer system. Private concerns would not have this power and authority and could only function by agreement of those who desired to be served. Thus, the activity is of such a unique nature that it can, in all practicality, only be performed by a governmental agency.

The Utah Supreme Court in State Water Pollution Control Board vs. Salt Lake City (1957), 6 Ut2d 247, 311 P2d 370, stated at page 374:

"Sewage disposal is a function which is almost invariably left to cities to perform, and our statutes specifically grant them the power to "construct, reconstruct, maintain and operate, sewer systems, sewage treatment plants, culverts, drains, sewers, catch basins, manholes, cess-pools and all systems, equipment and facilities necessary to the proper drainage, sewage and sanitary sewage disposal requirements of the city or town and regulate the construction and use thereof." It is therefore so patent as to hardly require demonstration that the maintenance of a sewerage disposal system is a proper function of the city."

In Cobia vs. Roy City (1961) 12 Ut2d 375, 366 P2d 986, action was brought against the City for damage resulting in an isolated case from sewage stoppage; a case almost identical to the incident case. The Court concluded that the operation of the sewer system by the City was a governmental function and that the City possessed governmental immunity. The Court stated at page 988:

"It seems to us that the operation of a sewer more nearly is governmentally charged than are most or all of those situations we have reviewed as reflected in the cases just mentioned. To exclude the operation of sewers from this field reasonably would seem unjustifiable in logic or otherwise."

And the Court further states on page 988:

"...we take considerable comfort in the most respectable authorities that agree with our conclusion that the operation of sewers is of a governmental nature..."

It would thus be strongly urged that the operation of a sanitary sewer system by Respondent is in fact the exercise of a governmental function as designated in Section 63-30-3, UCA, 1953, as amended. This section provides as follows:

"Except as maybe otherwise provided in this act, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility."

Thus, this activity would be protected by governmental immunity unless some other provision of the governmental immunity act waived such immunity. Section 63-30-10, UCA, 1953 as amended provides:

"Immunity from suit of all governmental entities waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of his employment except if the injury: ... (4) arises out of a failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property, or..."

In discovery proceedings, the Respondent asked Appellant:

"4. State specifically any factual basis upon which you claim negligence of the defendant in maintaining storm drains and sewer lines which would have caused plaintiff's damages." (R 23)

Appellant responded:

"ANSWER: The plaintiff on information and belief, believes that the defendant has regularly failed to inspect and check the various drains and sewer lines in and about the City of Clearfield." (R 26)

If in fact Appellant's injury resulted from the negligence of Respondent's employees in failing to make an inspection or in making an inadequate or negligent inspection of the sewer system, then Respondent is protected by governmental immunity as the Legislature has specifically not waived immunity under such circumstances'.

CONCLUSION

It is submitted to this Honorable Court that the Respondent, Clearfield City, in the operation and maintenance of its sanitary sewer system was performing a governmental function and was accordingly protected by governmental immunity as provided in UCA 63-30-1, et sec. In providing a sanitary sewer system, it was performing a duty imposed upon it to provide for the protection, health, welfare, safety and well-being of its citizens. Such a function is essential to the core of governmental activity.

As argued above, the successful construction, maintenance and operation of a sanitary sewer system requires power and authority that only a governmental agency can possess. Thus, as a practical matter, this activity is of such a unique nature that it can only be performed by a governmental agency. The operation of the sewer system by Respondent is thus a government function. Appellant claims that the only negligence of the Respondent was that it failed to regularly inspect and check the drains and sewer lines. Pursuant to UCA 63-30-10(4), governmental immunity from suit is not waived for injury proximately caused by a negligent act of an employee arising out of the failure to make an inspection or by reason of making an inadequate or negligent inspection of a property. The decision of the Lower Court in holding that the Respondent was protected by governmental immunity should be affirmed.

RESPECTFULLY SUBMITTED this 27th day of February, 1981.

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CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing
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84401 postage prepaid this 27th day of February, A.D., 1981.

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