1982

Ray M. Harding v. Alpine City : Brief of Appellant

Utah Supreme Court

Ray M. Harding; Attorney for Respondent;
John C. Backlund; Young, Backlund, Harris & Carter; Attorneys for Appellant;

SUPREME COURT
STATE OF UTAH

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RAY M. HARDING, :

Plaintiff/Respondent, :

vs. : Case No. 18,031

ALPINE CITY, :

Defendant/Appellant, :

--oooOooo--

APPELLANT'S BRIEF

--oooOooo--

Appeal from the Judgment of the
District Court of Utah County
State of Utah
Honorable Allen B. Sorensen, Judge

--oooOooo--

RAY M. HARDING
Attorney for Respondent
306 West Main Street
American Fork, Utah 84003
756-7658

JOHN C. BACKLUND
YOUNG, BACKLUND, HARRIS & CARTER
Attorneys for Appellant
350 East Center Street
Provo, Utah 84601
375-9801

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STATEMENT OF THE NATURE OF THE CASE

Respondent Ray M. Harding initiated this action seeking an order prohibiting enforcement of a municipal ordinance by Appellant, Alpine City. Said ordinance provides for mandatory connection to the City sewer system for inhabited property within five hundred (500) feet of an existing sewer line. Respondent also is seeking an order of the Court determining that the Appellant may not assess Respondent a sewer connection fee of $1,464.00. Appellant filed an Answer alleging that it has authority to enact and enforce said ordinance. Appellant, as an affirmative defense, alleged that Respondent failed to comply with the Utah Governmental Immunity Act. Appellant also filed a Counterclaim seeking an order requiring Respondent to connect to the sewer system and to pay the applicable connection fee.

DISPOSITION IN THE LOWER COURT

The District Court entered Summary Judgment in favor of Respondent on the 30th day of September, 1981.

RELIEF SOUGHT ON APPEAL

Appellant respectfully seeks a reversal of the Summary Judgment entered by the Trial Court. The Supreme Court should direct entry of judgment in favor of Appellant, or in the alternative, order the District Court to proceed to conduct a trial in this matter.

STATEMENT OF FACTS

The Alpine City sewer connection ordinance provides for mandatory connection to the City sewer system of all inhabited buildings on property within five hundred (500) feet of an existing city sewer line. Respondent's residence is situated upon Respondent's property lying approximately three hundred sixty-five (365) feet from an existing city sewer line. Appellant has assessed Respondent the applicable sewer connection fee of One Thousand Five Hundred Dollars ($1,500.00) of which One Thousand Four Hundred Sixty-Four Dollars ($1,464.00) remains due and owing the City.

Respondent filed a Complaint alleging that Appellant was without authority to require mandatory connection to the City sewer system for any building located on property located more than three hundred (300) feet from an existing City sewer line.

Appellant counterclaimed for an order requiring Respondent to pay the remaining amount due on the sewer connection fee.

Appellant established the five hundred (500) foot mandatory connection requirement upon the advice of its City Engineer.

The Trial Court took no evidence with respect to the reasonableness of the mandatory connection requirement.

ARGUMENT

POINT I

SUMMARY JUDGMENT IS NOT APPROPRIATE IN THE INSTANT CIRCUMSTANCES.

Rule 56(c) of the Utah Rules of Civil Procedure provides as follows:

> . . . 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.

The Summary Judgment should not be affirmed because significant issues of material fact exist and Respondent is not entitled to judgment as a matter of law. Respondent, in making a Motion for Summary Judgment, has ignored these essential principles of summary judgment analysis under Utah law.

First, upon motion for summary judgment, the trial court is required to consider all relevant facts and their reasonable inferences in a light most favorable to the party against whom the motion is made. The Utah Supreme Court noted in Controlled Receivables, Inc. v. Harmon, 17 Utah 2d 420, 413 P.2d 807 (1966) as follows:

> A motion for summary judgment is a harsh measure, and for this reason plaintiff's contentions must be considered in a light most to his advantage and all

> doubts resolved in favor of permitting him to go to trial; and only if when the whole matter is so viewed he could, nevertheless, establish no right to recovery should the motion be granted.

Id., 413 P.2d at 809. For other numerous references made by the Court to this proposition, see Hughes v. Housley, 599 P.2d 1250 (Utah 1979); Livingston Industries, Inc. v. Walker Bank & Trust Co., 565 P.2d 117 (Utah 1977); Foster v. Steed, 19 Utah 2d 435, 432 P.2d 60 (1967).

Second, if the facts and their reasonable inferences when viewed in a light most favorable to the non-moving party are in dispute, summary judgment is simply improper. In Holbrook Co. v. Adams, 542 P.2d 191 (Utah 1975), the Utah Supreme Court stated:

> It is not the purpose of the summary judgment procedure to judge the credibility of the averments of the parties or witnesses or the weight of the evidence. Neither is it to deny parties the right to a trial to resolve disputed issues of fact. Its purpose is to eliminate the time, trouble and expense of trial when upon any view taken of the facts as asserted by the party ruled against, he would not be entitled to prevail.

Id., at 193. See also Peterson v. Fowler, 29 Utah 2d 386, 510 P.2d 523 (1973); University Club v. Invesco Holding Corp., 29 Utah 2d 1, 504 P.2d 29 (1972); Transamerica Title Insurance Co. v. United Resources, Inc., 24 Utah 2d 346, 471 P.2d 165 (1970); and Robinson v. Employers Liability Assurance Corp., 22 Utah 2d 163, 450 P.2d 91 (1969).

Third, because an improperly granted summary judgment represents an extremely high cost in terms of time and resources to both the litigants and the courts of this state, summary judgment should not be granted in any but the most clear-cut

cases. To this effect is the court's holding in Durham v. Margetts, 571 P.2d 1332 (1977):

> The summary judgment procedure has the desirable and salutary purpose of eliminating the time, trouble and expense of a trial when there are no issues of fact in dispute and the controversy can be resolved as a matter of law. Nevertheless, that should not be done on conjecture, but only when the matter is clear; and in case of doubt, the doubt should be resolved and allowing the challenged party the opportunity of at least attempting to prove his right of recovery.

Id., at 1334. Appellant maintains that there are substantial and material issues of fact in dispute, and that the controversy therefore cannot be resolved against Appellant by Summary Judgmer as a matter of law.

The Trial Court should have received evidence upon the reasonableness of the mandatory connection requirement. Such factors as protection of precious water sources from disease and contamination; density of existing and proposed housing; soil type and suitability for septic tanks and other relevant factors should have been considered.

POINT II

THE ENACTMENT OF THE ALPINE CITY SEWER CONNECTION ORDINANCE WAS A VALID EXERCISE OF THE GENERAL POLICE POWERS OF ALPINE CITY.

Prior to the decision of the Utah Supreme Court in the case of State v. Hutchinson, No. 16087, Utah had followed the so-called Dillon rule first enunciated in Merriam v. Moody's Executors, 25 Iowa 163 (1868). Essentially, the Dillon rule provided that local units of government had no powers or authority to act unless such action was taken pursuant to a specific grant of authority by the State Legislature.

In Hutchinson, supra, the defendant challenged the constitutionality of a county ordinance which required the filing of campaign statements and the disclosure of campaign contributions. The defendant challenged the ordinance on the basis that absent a specific grant of authority from the legislature, the county was powerless to enact this type of ordinance. The issue in the case was whether or not the general welfare grant found in Utah Code Annotated, Section 17-5-77, 1953 as amended, by itself provided a county with legal authority to enact this type of ordinance or whether there must be a specific grant of authority for counties to enact such measures. The Utah Supreme Court held that the rule requiring strict construction of powers delegated by the legislature to counties and municipalities is a rule which is archaeic, unrealistic and unresponsive to the current needs of both state and local governments and effectively nulifies the legislature's grant of general police power to the counties.

The campaign ordinances were held to be permissable under the general welfare provision above cited, as an independent source of power to act for the general welfare of county citizens. The opinion significantly broadened the authority of local governments to enact ordinances unique to local government. As the Supreme Court stated:

> When the state has granted general welfare to local governments, these governments are independent authority apart from and in addition to specific grants of authority to pass ordinances which are reasonably and appropriately related to the objectives of that power . . . and the courts will not interfere with the legislative choice of the means selected unless it is arbitrary, or is directly prohibited by

> or is inconsistent with the policy of, the state or federal laws or the constitution of this state or of the United States.

The provisions of Utah Code Annotated, Section 17-5-77, 1953 as amended, relating to a general grant of powers to county commissioners, are virtually identical to the provisions of Utah Code Annotated, Section 10-8-84, 1953 as amended, which is a general grant of authority to municipalities in the State of Utah.

Section 10-8-84, Utah Code Annotated, 1953 as amended, was cited by the Utah State Supreme Court in the case of John Cal and Clark Jenkins v. City of West Jordan, No. 15908, filed December 26, 1979, a case involving a suit by several subdividers against the City of West Jordan challenging imposition of a so-called impact fee. The court, in determining that the city, in fact, had authority to impose that type of fee, even though there exists no state statute specifically granting cities that authority, cited with approval, Section 10-8-84, UCA.

McQuillin, Municipal Corporations, 3rd Edition Revised, Volume 11, Section 31-10, states as follows:

> The establishment and maintenance of a sewer system by a municipality is usually regarded as an exercise of its police power and so is an ordinance requiring property owners to make connections therewith. All persons hold their property subject to the law providing for the public health and general welfare and when sewers are necessary for the preservation of the public health, property must bear its just proportion of the cost of the construction and maintenance of them.

McQuillin, in Section 31-30 also states:

> Power to regulate and control sewers and drains carries with it as a necessary incident authority to compel, regulate and control all dispensible, desirable or

> convenient connections subject, of course, to the observance of private property rights, accordingly, express power to 'construct, establish and maintain drains and sewers' includes power to make reasonable regulations for tapping and connecting with the sewers. Municipalities are generally authorized to compel property owners to make connection with the sewer within a reasonable distance when the public health requires it, and to pay the cost and expenses involved, all of which may be provided for by statute or ordinance, in the exercise of the police power.

Section 10-8-38, Utah Code Annotated, 1953 as amended, does provide that any city or town may, for the purpose of defraying the construction, reconstruction, maintenance, or operation of any sewer system or sewer treatment plant, provide for mandatory hookup where the sewer is available and within 300 feet of any property line with any building used for human occupancy and make a reasonable charge for the use thereof. Said section certainly does not prohibit municipalities from requiring owners of property situated within 500 feet of any property line to connect to the municipal sewer system. Applying the Hutchinson decision, it would certainly be within the Respondent's power to require such property owners to connect to the City sewer system where such requirements are reasonable, uniform and arbitrary in application. The provisions of Section 10-8-38, UCA, 1953 as amended, is a grant of authority but is not a specific limitation upon the exercise of authority by municipalities.

In the case of Rupp v. Grantsville (Utah 1980) 610 P.2d 338, this Court upheld the mandatory sewer connection ordinance of the municipality of Grantsville. The opinion contains the following language:

In Utah, municipalities are granted broad powers for the protection of the health and welfare of their residents. Among these powers is the statutory authority to establish and maintain public utilities for the benefit of those residents. Inherent in the power to preserve and protect the health and welfare of municipal residents is the authority to adopt ordinances directed at the effectuation of that protection. This general grant of police power is codified in 70-8-84 which provides:

> 'They [municipalities] may pass all ordinances and rules and make all regulations not repugnant to law, necessary for carrying into effect or discharging all powers and duties conferred by this chapter, and such as are necessary and proper to provide for the safety and preserve the health and promote the prosperity . . . comfort and convenience of the city and inhabitants thereof, and for the protection of property herein; . . .'

The scope of police power conferred on municipal governments by the requirements incident to effective protection of the health and welfare of their citizenry are reflected in statutes such as 70-8-84. The relationshi between a mandatory connection ordinance and this polic power was recognized in Bigler v. Greenwood. In Bigler this Court in upholding the mandatory connection ordinance explained:

> 'Such an ordinance is undeniably proposed to protect the health and welfare and is therefor a valid exercise of authority expressly conferred under the police power.'

There is nothing in the present situation which require a retreat from that position. The Grantsville ordinanc in question is a valid exercise of the municipalities recognized police power and therefore is enforceable against the plaintiffs.

It is clear that under the rationale of Hutchinson, Call, and Rupp, supra, that Appellant has the authority to enact and enforce a reasonable mandatory sewer connection ordinance. The Trial Court erred in granting Respondent's Motion for Summary Judgment, and in failing to receive evidence with respect to the reasonableness of the ordinance.

Respondent argues that the Utah State Legislature has

pre-empted the area of mandatory connection to a sewer by passage of UCA 10-8-38, 1953 as amended. Said statute provides, in part, that a city " . . . may . . . provide for mandatory hookup where the sewer is available and within 300 feet of any property line with any building." (Underlining added.) Appellant contends that said statute does not purport to limit a municipality from increasing the distance requirement. Municipalities must of necessity be allowed to exercise municipal powers in a flexible and effective manner to appropriately deal with varying circumstances. Appellant must have the inherent power to determine a reasonable distance for mandatory connection to the city sewer system and to take into account protection of vital water sources, prevention of disease, and other relevant factors.

RESPECTFULLY SUBMITTED this 8th day of January, 1982.

JOHN C. BACKLUND
Attorney for Appellant
350 East Center Street
Provo, Utah 84601
375-9801

MAILING CERTIFICATE

I hereby certify that I mailed a copy of the foregoing to Ray M. Harding, Attorney for Plaintiff/Respondent, 306 West Main Street, American Fork, Utah 84003, postage prepaid, this 8th day of January, 1982.