

1968

## H. Grant Johnson and Helen Johnson, His Wife v. Salt Lake County Cottonwood Sanitary District : Respondent's Brief

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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H. GRANT JOHNSON and HELEN  
JOHNSON, his wife,

*Plaintiffs and Appellants,*

—vs.—

SALT LAKE COUNTY COTTON-  
WOOD SANITARY DISTRICT

*Defendant and Respondent.*

Case No.  
11077

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RESPONDENT'S BRIEF

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Appeal from the Judgment of the Third District Court  
In and for Salt Lake County, Utah  
The Honorable D. Frank Wilkins, Judge

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IN THE SUPREME COURT  
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H. GRANT JOHNSON and HELEN  
JOHNSON, his wife,  
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                    —vs.— )  
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WOOD SANITARY DISTRICT )  
                    *Defendant and Respondent.* )

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RESPONDENT'S BRIEF

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NATURE OF THE CASE

This is an action for property damage sustained by the plaintiff when sewage backed up defendant's lines into plaintiffs' basement.

DISPOSITION IN THE LOWER COURT

The lower court granted defendant's Motion to Dismiss.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the lower court.

## STATEMENT OF FACTS

Plaintiffs are homeowners in Cottonwood, an unincorporated area of Salt Lake County. To provide residents of this fast-growing area with essential sanitary service on a community basis instead of allowing an obviously unhealthful proliferation of individual septic tanks, Salt Lake County Cottonwood Sanitary District was organized according to the statutory design set forth in Title 17, Chapter 6, Utah Code Annotated. On March 15, 1966, plaintiffs' basement was flooded with sewage backing from defendant's lines.

Plaintiffs filed their Complaint alleging negligence and stating as a conclusion without pleading supporting facts "said event constitutes a breach of the contract between plaintiff and defendant" (R-1, 3). Defendant moved to dismiss before answer and the motion was heard at pretrial and again before trial.

## ARGUMENT

## POINT I

SEWER DISTRICTS ARE GOVERNMENTAL ENTITIES PERFORMING A GOVERNMENTAL FUNCTION AND ARE ENTITLED TO GOVERNMENTAL IMMUNITY FOR ACTS OF NEGLIGENCE.

Assuming for purposes of this appeal that defendant was negligent which negligence caused the damage to plaintiffs' home, as a governmental agency performing a necessary municipal function it is not liable for acts of simple negligence. As this Court recently decided in *Cobia v. Roy City*, 12 U. 2d 375, 366 P.2d 986 (1961):

Our concern is whether an incorporated city is liable for damage resulting from a sewer stoppage on a theory of (1) negligence or (2) nuisance, in an isolated case, where the question pointed up is whether operation of a sewer is governmental or proprietary. Under the facts of this case, and because of what we have said before, we think the result is the same whether it is urged on negligence or nuisance grounds. We express no opinion as to a situation where the condition is one resulting in continuing damage.

Utah constantly has adhered to the principle of governmental immunity where the sovereign has been attacked on account of injury to property, *which principle has been applied to state activity or that of its agencies, such as school boards, cities, counties, the highway department, and the like.*

It is recognized that there is but one Utah case having to do with sewers, which was decided before statehood (1892) (*Kiesel v. Ogden City*, 8 Utah 237, 30 P. 758) which determined that the operation of a sewer was actionable against the city if negligence was shown to exist. So far as that case is inconsistent with what is said here, it is reversed, particularly since that case predated our state sovereignty, our Constitution and subse-

quent legislation that gave new breadth and immunity to state agencies, except where specifically waived.

*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. To do so would do violence to our concept of separation of powers, we believe. We have left to the Constitution and legislature the matter of waiver of immunity in such cases. (Emphasis added.)*

The Court, continuing, reaffirmed its definition of a governmental function as relating to the nature of the activity: "It must be something done or furnished for the public good." The supplemental tests are: "(a) whether there is special pecuniary benefit or profit to the city and (b) whether the activity is of such a nature as to be in real competition with free enterprise."

From the *Cobia* holding, it is apparent that, were defendant a municipality, plaintiffs' claim in negligence would be barred. But plaintiffs assert that this Court has refused to extend the doctrine to special improvement districts, relying upon *Nestman v. South Davis County Water Improvement District*, 16 U. 2d 198, 398 P. 2d 203 (1965). That case, however, involved a function which has always been held to be proprietary in nature in this state—operating a water system.



The Court in *Nestman* expressly made this distinction saying:

Quite apart from the fact just noted above, that the defendant Water District is of somewhat different character than the governmental entities to which sovereign immunity has been applied, *there is a more important and controlling reason* why the District is not entitled to that protection. Where a public body, which would otherwise be entitled to sovereign immunity, engages in an activity of a commercial or proprietary character, the protection does not exist. Specifically, we have held that when a city carries on the business of operating a water system and supplying water for fees, it is a proprietary function, and the city is liable for damage or injury caused by its negligence in connection therewith; and that the same is true of irrigation companies. Inasmuch as this activity is a proprietary one when carried on by a city, it could not very well be deemed otherwise when carried on by the defendant Water District.

\* \* \*

It would indeed be anomalous and unjust if the inhabitants of an area could operate such a project under sovereign immunity by forming a district, whereas, if the same area, or a comparable one, incorporated as a city, and carried on the same activity, it would be without such protection. (Emphasis added.)

The present case is the reverse of this coin. If it would be anomalous and unjust to give an improvement district an immunity not enjoyed by municipalities performing the same function, it would be equally anomalous

and unjust to deny a district immunity for performing a function protected when performed by a municipality.

Other jurisdictions where sewage disposal is considered a governmental function have made no distinction between sewage disposal provided by municipal corporations and that provided by improvement districts. *Page v. Metropolitan St. Louis Sewer District*, (Mo., 1964) 337 S.W. 2d 348; *Fawbush v. Louisville and Jefferson County Metropolitan Sewer District*, (Ky., 1951) 240 S.W. 2d 622; *Sinclair Pipe Line Co. v. Lipscomb* (Tex. Civ. App., 1957) 308 S.W. 2d 584; *Beck v. Boh Bros. Const. Co.*, (La., 1954) 72 So. 2d 765; *Gnau v. Louisville and Jefferson County Metropolitan Sewer District*, (Ky., 1961) 346 S.W. 2d 754.

In the *Gnau* case, *supra*, the trial court dismissed the action, holding that it had no jurisdiction over the defendant because of governmental immunity. The Kentucky Supreme Court affirmed saying:

The sewer district is an independent public corporation, autonomous and self-sustaining, and . . . is performing a governmental function in the preservation and promotion of public health. We recognized (in *Fawbush*) that the Sewer District is an agency of the State and thus cloaked with immunity from liability for injury occasioned by negligent acts of its servants.

Leading writers in the field uphold this reasoning. As stated in 18 McQuillan, *Municipal Corporations* (1963 Ed.), 111-122 Sec. 53.05 (*Immunity of Quasi-Municipal Corporations*):

It is pertinent to here state that there is a distinction between municipal corporations proper and quasi-municipal corporations concerning liability for torts, and that the general rule is that the latter are not liable for torts unless so provided by statutes.

The immunity from liability of quasi-public corporations is generally placed upon the ground of their involuntary and public character. They are usually treated as public or state agencies, and their duties are ordinarily wholly governmental. They exercise the greater part of their functions as agencies of the state merely, and are created for purposes of public policy.

Under exceptional circumstances, however, at least in some states, counties, towns and similar organizations, have been held liable for torts. Thus, liability has been imposed where the tort was connected with an undertaking conducted in part at least for profit, or which was in the nature of a proprietary activity.

Although the authorities are by no means uniform, the rule of immunity above referred to, has been applied to a wide variety of governmental and political organizations, including drainage districts, flood control districts, utility districts, improvement districts, . . . and of course, counties.

Appellants assert there was a waiver of immunity by use of the words "sue and be sued" in the enabling statute. (Brief p. 4). These words do not imply a waiver of immunity. *Page v. Metropolitan St. Louis Sewer District, supra*. In *Bingham v. Board of Education*, 118 Utah 582, 223 P.2d 432 (1950) this Court was asked to construct a similarly worded statute reading:

The board of education of every school district shall be a body corporate . . . *may sue and be sued*, and may take, hold, lease, sell and convey real and personal property as the interests of the schools may require. Utah Code Annotated (1953) 53-4-8. (Emphasis added.)

In that case the board of education was held immune from suit for negligence. See also *Campbell v. Pack*, 15 U.2d 161, 389 P.2d 464 (1964). School districts, although not municipal corporations, are among the government agencies and bodies which have heretofore been accorded immunity. There are many similarities between school boards and special improvement districts in their statutory authority, organization, financing and administration.

## POINT II

THE PLAINTIFFS' COMPLAINT DID NOT STATE A SEPARATE CLAIM IN CONTRACT.

Plaintiffs' brief indicates a reliance upon a contract to support recovery. (Brief, p. 2). Contrary to appel-

lants' assertion, it has not been stipulated that a contract between plaintiffs and defendant exists. From the wording of the Pretrial Order, it is clear the Court and counsel understood that a ruling that defendant is entitled to sovereign immunity would be dispositive of the case.

Although defendant does not assert that it would be immune for breach of contract, the trial court properly disregarded the characterization of this claim as a breach of contract in an attempt to circumvent the doctrine of governmental immunity.

#### Plaintiffs alleged in their Complaint:

Defendant permitted the sewage out of its gathering lines . . . which said event . . . would not occur if the defendant operated its sewer collection . . . in a *reasonably careful and ordinary manner*, and said event constitutes a breach of the contract between plaintiff and defendant to collect and carry away from their home sewage . . . (R. 2). (Emphasis added.)

The essential nature of the action is a tort. Had defendant refused to pay a bill for pipe a different case would be presented. Here the alleged breach was of a duty imposed by law, not contract.

The pleading in this case is similar to that in *Lindsay v. Woodward*, 5 U. 2d 183, 299 P.2d 619 (1956), which

involved a counterclaim in malpractice. Breach of an implied agreement arising out of the relationship was alleged to circumvent the shorter tort statute of limitations. Applying Idaho law, this court found against the patient, relying upon *Trimming v. Howard*, 52 Ida. 412, 16 P. 2d 661. In the *Trimming* case a physician allegedly broke and negligently failed to remove a hypodermic needle which had been inserted into plaintiff's spinal column during treatment for spinal meningitis. The Complaint stated:

The defendant was guilty of gross negligence and carelessness and failed to exercise ordinary care and common prudence . . . *and in violation of the contractual duty . . . to skillfully and carefully treat the plaintiff and remove said needle from his back* and in breach of the duty by reason of the defendant's profession and the contractual relationship . . . in that the said defendant has grossly, negligently and carelessly left in plaintiff's back a portion of said broken needle approximately three-fourths of an inch in length.

The Idaho Supreme Court stated:

This case is presented to the court upon two theories, appellant contending that it is one on contract, colored with recently discovered fraud and concealment, tolling the statutes of limitation, and respondent is insistently contending that it is a case of malpractice, sounding in tort, and therefore barred by C. S. Section 6612, subd. 4. The complaint primarily alleges that a contract

for treatment was entered into between the parties. So far so good. But, in the performance of that contract, respondent impliedly contracted that he would exercise ordinary and reasonable care, the which is another way of saying that such duty is imposed by law.

\* \* \*

We do not have to deal here with a contract whereby the surgeon expressly undertook to use extraordinary skill and care. *That being out of the way, the charging parts of the complaint will determine whether or not the gravamen of this action consists of a breach of the contract, itself, or the duty imposed by law in relation to the manner of its performance.* Aside from the one allegation of fraud and concealment, *the basic allegations of the complaint are directed solely to carelessness, negligence, and misconduct as the proximate cause of the injury claimed to have been suffered. Respondent is not arraigned for breach of contract, but for delinquencies incidental to its performance. As alleged, these are the very foundation of the action, and, if true, constituted nothing but malpractise. The gist of a malpractise action is negligence, not a breach of the contract of employment. The original injury, be it caused by carelessness, negligence, misconduct, or what-not, remains the sole cause of action; and the action is one in tort and not for a breach of contract. The appropriate statute of limitations is determined by the substance, not the form, of the action.* We hold, therefore, that the instant case based upon a cause of action sounding in tort is plainly a suit for malpractise. (Emphasis added.)

See also, *Taylor Bros. Co. v. Duden*, 112 Utah 436, 188 P.2d 995 (1948). In *Sinclair Pipe Line Co. v. Lipscomb*, *supra*, the court disregarded the pleading of an unconstitutional taking by noting the nature of the claim asserted was negligence.

## CONCLUSION

The defendant is a governmental agency performing a governmental function with the support of its statutory taxing power. That function does not become proprietary when performed by other than a city any more than this claim becomes one for breach of contract by calling it so.

The judgment of the trial court should be affirmed.

Respectfully submitted,

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