

1960

Arthur W. Fairclough et al v. Salt Lake County et al : Reply Brief of Appellants

Utah Supreme Court

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In the Supreme Court of the State of Utah

ARTHUR W. FAIRCLOUGH, FRED FAIRCLOUGH, ANTHONY M. CRUS, THOMAS CRUS, and JOHN CRUS, doing business as FAIRCLOUGH & CRUS,
Plaintiffs and Respondents,

vs.

SALT LAKE COUNTY, LAMONT B. GUNDERSEN, WILLIAM G. LARSON and EDWIN Q. CANNON, SR.; ROAD COMMISSION OF UTAH, C. TAYLOR BURTON, FRANCIS FELTCH, ERNEST H. BALCH, WILLIAM J. SMIRL and WESTON E. HAMILTON,
Defendants and Appellants.

Case No.
9140

REPLY BRIEF OF APPELLANT'S

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CASES CITED

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CONSTITUTION CITED

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CRUS, THOMAS CRUS, and JOHN
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SON and EDWIN Q. CANNON, SR.;
ROAD COMMISSION OF UTAH, C.
TAYLOR BURTON, FRANCIS
FELTCH, ERNEST H. BALCH,
WILLIAM J. SMIRL and WESTON
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REPLY BRIEF OF APPELLANTS

PRELIMINARY STATEMENT

In the view of arguments presented by respondents in their brief in this matter and in light of the recent decision of this Court in the case of *Springville Banking Co. v. Burton, et al*, . . . U. 2d . . . , . . . P. 2d . . . , appellants feel it necessary to file this reply brief in the matter now pending.

STATEMENT OF POINTS

POINT I.

ARTICLE I, SECTION 22 OF THE UTAH CONSTITUTION IS NOT A SELF EXECUTING CONSENT BY THE STATE OF UTAH TO BE SUED FOR CONSEQUENTIAL DAMAGES.

POINT II.

A WRIT OF MANDAMUS SHOULD NOT BE ORDERED IN THIS CASE.

ARGUMENT

POINT I.

ARTICLE I, SECTION 22 OF THE UTAH CONSTITUTION IS NOT A SELF EXECUTING CONSENT BY THE STATE OF UTAH TO BE SUED FOR CONSEQUENTIAL DAMAGES.

Respondent agrees in the first page of his brief herein that this action is essentially one against the State and we will treat it as such.

This Court has held in a long line of cases, culminating in *Springville Banking Co. v. Burton*, supra, that the State of Utah may not be sued without its consent. In an effort to escape this long established rule, respondent alleges the Utah Constitution, Article I, Section 22, which reads:

“Private property shall not be taken or damaged for public use without just compensation.”

constitutes a self executing waiver of the State’s sovereign immunity and a consent to be sued.

This same argument now advanced by respondent has been presented to, considered and specifically rejected by this Court. *Springville Banking Co. v. Burton, et al.*, supra. Therein plaintiff attempted to force an eminent domain action through a writ of mandamus. The court stated:

“1) Can plaintiff, employing the extraordinary writ of mandamus, compel the state to pay damages, when *because of sovereign immunity, it could not have done so in a direct suit against the state or the Road Commission?*” (Emphasis added.)

The court then answers this question as follows:

“We believe and hold that the procedure chosen by plaintiff was an effort indirectly *to do that which repeatedly we have held could not be done directly.*
* * *” (Emphasis added.)

Such language clearly indicates the State may be subjected to direct suit.

It seems apparent from the position taken by this Court in the *Springville Banking Co.* case, supra, that the question of Article I, Section 22, effecting a consent to suit has been fully explored and set at rest by the rejection of such argument by this Court.

POINT II.

A WRIT OF MANDAMUS SHOULD NOT BE ORDERED IN THIS CASE.

Appellants do not concede that the question of mandamus is now properly before this Court. In view of the limited nature of the proceedings below as detailed in ap-

pellants' previously filed brief, the sole question here to be determined is that of the State's sovereign immunity, and not an initial determination of the availability of other remedies.

However, it has been authoritatively settled in this state that a writ of mandamus, to force the state to bring suit against a claimant of consequential damages, will not be allowed inasmuch as such action is merely circumvention of the well established prohibition of direct damage actions against the sovereign without consent. *Springville Banking Co. v. Burton, et al.*, supra.

CONCLUSION

Appellants submit their motion to dismiss should have been granted by the District Court and hence the denial thereof should be reversed.

Respectfully submitted,

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