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Jerry Sine and Dora A. Sine, His Wife v. Henry C. Helland, Director of Highways, et al. : Brief of Appellants

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In The Supreme Court of the State of Utah

HENRY SINE and DORA A. SINE, his wife,
Plaintiffs-Respondents

- vs. -

HENRY C. HELLAND, Director of
Highways, et al.,
Defendants-Appellants

BRIEF OF APPELLANTS

Interlocutory Appeal from an Order of the
Third District Court for Salt Lake County
Honorable Marcellus K. [illegible]

FILED
At [illegible]

At [illegible]

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In The Supreme Court of the State of Utah

JERRY SINE and DORA A. SINE, his wife,
Plaintiffs-Respondents,

- vs. -

HENRY C. HELLAND, Director of
Highways, et al.,

Defendants-Appellants.

} Case No.
10540

BRIEF OF APPELLANTS

STATEMENT OF THE KIND OF CASE

The defendants-appellants herein have appealed to the Supreme Court of the State of Utah by an interlocutory appeal from an order of the Honorable Marcellus K. Snow, Judge of the Third Judicial District Court, Salt Lake County, denying a motion to dismiss respondents' complaint, wherein respondents seek a writ of mandamus directing appellants to commence a condemnation proceeding to establish damages, if any, and compensation for the taking of property to be the subject of said condemnation proceeding.

DISPOSITION IN LOWER COURT

On September 21, 1965, respondents filed an

amended complaint in the Third Judicial District Court of Salt Lake County, State of Utah. On October 27, 1965, the appellants filed a motion to dismiss the amended complaint, said motion being heard on November 22, 1965, before the Honorable Marcellus K. Snow, Judge, who after argument thereon denied appellants' motion with prejudice. A petition was filed in this court, pursuant to Rule 720 of the Utah Rules of Civil Procedure, on January 12, 1966, praying that this court review the interlocutory ruling of the lower court denying appellants' motion to dismiss. This court, by order dated February 4, 1966, granted the petition for interlocutory appeal and this brief is submitted in support of the issues raised by the appellants in their petition and in the motion to dismiss the amended complaint in the lower court.

RELIEF SOUGHT ON APPEAL

The appellants seek reversal of the lower court's order denying their motion to dismiss the amended complaint.

STATEMENT OF FACTS

In September of 1965, respondents Jerry Sine and Dora A. Sine, his wife, filed an amended complaint in the Third Judicial District Court in and for Salt Lake County (Case No. 156331), against Henry C. Helland, Director of Highways, Weston E. Hamilton, Chairman, Elias J. Strong, Francis Felch, Clem Church and Ernest H. Balch, members of the State

Road Commission, and Phil L. Hansen, Attorney General of the State of Utah, for the purpose of requiring them to institute an action under the eminent domain statutes of the State of Utah, condemning respondents' property in Block 61, Plat "C", Salt Lake City Survey, and permit the respondents to prove damages and receive compensation for the alleged damage of said property.

The appellants in October, 1965, filed their motion to dismiss on the grounds that (1) the appellants had not consented to be sued and were acting in their governmental function as the Director of Highways, the State Road Commission, and the Attorney General of the State of Utah, and such were immune from suit, and (2) that the matters pleaded in respondents' complaint had been fully litigated in the **State of Utah v. Joseph Parker**, et al., 13 Utah 2d 65, 368 P.2d 585.

ARGUMENT

POINT I

THE STATE OF UTAH, ACTING THROUGH ITS ROAD COMMISSION, IS IMMUNE FROM SUIT FOR CONSEQUENTIAL DAMAGE TO REAL PROPERTY, NO PART OF WHICH IS EXPROPRIATED FOR A PUBLIC IMPROVEMENT.

It is rather evident from a reading of the complaint that the pleaders seek to recover damages against the State of Utah consequentially resulting from the raising of a public improvement on prop-

erty, no part of which was owned or possessed by the respondents.

Respondents allege in their amended complaint (R. 17):

"23. The State of Utah and its State Road Commission and its Attorney General were and are free to include and should include as defendants in a condemnation action persons situated as plaintiffs with reference to the above described property.

"24. The United States of America and the State of Utah and its Highway Department have funds available for the payment of damage claims to such persons as the plaintiffs except that the State of Utah hides behind a claim of sovereign immunity which is effectuated through failure to name such persons as are known to be threatened with damage as parties defendant in condemnation actions and by refusal to negotiate to conclusion for the damage such persons will suffer or by recognizing the damage actually suffered by such persons after the highway has been wholly or partially constructed."

The law in this jurisdiction has been firmly established by a host of decisions issuing from this court that the State of Utah, acting in its sovereign capacity, may not be sued without its consent. **Wilkinson v. State of Utah**, 48 Utah 483, 134 Pac. 666 (1913); **Springville Banking Co. v. Burton**, 10 U.2d 100, 349 P.2d 157 (1960); **Fairclough v. State Road Commission**, 10 U.2d 417, 354 P.2d 104 (1960); and **State v. Parker**, 13 U.2d 65, 368 P.2d 585 (1962).

In the **Springville Banking** case, *supra*, the landowner brought an action in mandamus to require

members of the State Road Commission to initiate eminent domain proceedings for damages allegedly produced by reason of impairment of access to their place of business. This court held that sovereign immunity was a defense to the action brought by the landowner and that the case was dispositive on that premise.

“ . . . 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?”
(349 P.2d at 158)

The court answered the question posed by saying:

“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, which is dispositive of this case on that ground.”
(349 P.2d at 158)

In the **Fairclough** case, *supra*, the landowners alleged, as do the respondents in the instant case, that the construction of the public highway facility had damaged their property which abutted upon the highway right of way. The State Road Commission filed a motion to dismiss the complaint, based upon its immunity from suit for consequential damages to property, no part of which was placed to the public use. This court declared that absent a declaration by the Legislature to the contrary, immunity of the sovereignty was paramount and a proper defense to the action. The court stated:

"As to 1), consistently and historically we have ruled that the State may not be sued without its consent; taken the view that Art. I, Sec. 22 of our Constitution is not self-executing, nor does it give consent to be sued, implied or otherwise; and that to secure such consent is a legislative matter, a principle recognized by the legislature itself."
(354 P.2d at 106)

In **State v. Parker**, *supra*, the court said:

"On numerous occasions we have held that such damage is not recoverable because of the State's immunity. *Fairclough v. Salt Lake County*, a case most similar to this one, is our last pronouncement in this respect. Therein are cited our previous decisions which we are disinclined to reverse. Contrariwise, we consider and hold that the *Fairclough* case and those cited therein are dispositive here, to which authorities we refer the reader without needless repetition."
(368 P.2d at 58)

Consequently, the respondents' complaint should have been dismissed.

POINT II

THE MATTERS PLEADED IN THE AMENDED COMPLAINT ARE RES JUDICATA.

In **Wheadon v. Pearson**, 14 U.2d 45, 376 P.2d 942 (1962), the court quoted and reaffirmed the doctrine as to res judicata as set forth in **East Millcreek Water Co. v. Salt Lake City**, 108 Utah 315, 159 P.2d 863 (1945) as follows:

" . . . there are two kinds of cases where the doctrine of res judicata is applied: In the one the former action is an absolute bar to the maintenance of the second; it usually bars the successful party

as well as the loser; it must be between the same parties or their privies; it applies not only to points and issues which are actually raised and decided therein but also to such as could have been therein adjudicated, but it only applies where the claim, demand or cause of action is the same in both cases."

In the matter now before this court, the defense of sovereign immunity was raised in the lower court. The respondents in **State v. Parker**, supra, Jerry Sine and Dora P. Sine, his wife, are the respondents in the present action. In addition, the Utah State Road Commission, the appellant in **Parker**, is the appellant in the present action. The allegations in **Parker** and this action are identical. Both claim consequential damage as the result of the building of the same interstate highway abutting the same motel and property. The only difference being that in **Parker**, the respondents here were counter-claimants.

The court in **Parker** held that:

"As to Sine's argument that he, being a defendant, may counterclaim and recover, is answerable by the simple and authoritative conclusions that neither under our rules or elsewhere, can a counterclaimant cast himself in any other role than that of a plaintiff. If Sine, as plaintiff, had sued the State in this case, he would have been unable to proceed under the authorities referred to above. Since a counterclaim must be invested with all the requisites of a complaint, it would strain reason to conclude that it would have any attribute that would alter nonresult into result."

(368 P.2d at 587)

Respondents' action is clearly barred.

CONCLUSION

The order of the Third District Court, denying the motion of the State of Utah to dismiss the complaint, should be reversed.

Respectfully submitted,
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