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IN THE SUPREME COURT
of the
STATE OF UTAH

ARNOLD BRINKERHOFF and
INEZ BRINKERHOFF, his wife,
Plaintiffs and Respondents,

vs.

SALT LAKE CITY, a Municipal
Corporation,
Defendant and Appellant.

Case No.
9456

APPELLANT'S BRIEF IN ANSWER TO PETITION FOR REHEARING

Appeal from the Judgment of the Third Judicial District Court
in and for Salt Lake County, State of Utah
Hon. Joseph G. Jeppson, Judge

HOMER HOLMGREN
City Attorney
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APPELLANT'S BRIEF IN ANSWER TO PETITION FOR REHEARING

STATEMENT OF FACTS

The facts in this matter have been fully stated in the Appellant's brief and as supplemented by the brief of the Respondent.

ARGUMENT

POINT I

THE COURT DID NOT ERR IN HOLDING THAT THE PLAINTIFFS WERE PRE-

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CLUDED FROM RECOVERING BECAUSE OF GOVERNMENTAL IMMUNITY, AS SUCH ISSUE MAY BE RAISED AT ANY STAGE IN THE PROCEEDING, WHETHER PLEADED OR NOT.

In the case of *Wilcox vs. the City of Rochester,* a N.Y. case, 82 N.E. 1119, the court held:

> "The defense that a city is not liable for the negligent acts of an employee in the discharge of governmental functions exercised by the city is available, though not pleaded."

In the case of *McNair v. State et al.,* 305 Mich. 181, 9 N.W. 2d 52, the court held:

> "From an examination of the above acts relied upon by petitioner, we are unable to find an express or implied intent upon the part of the legislature to abolish the defense of sovereign immunity. The authority to waive such defense is in the legislature and until there is legislative action authorizing an officer or agent of the State to waive such defense, it may not be done by any officer or agent.
>
> "Petitioner also urges that defendant waived the defense of sovereign immunity by its failure to plead the same when the cause was at issue in the court of claims. If, as we hold such defense can only be waived by legislative action, then it necessarily follows that the attorney general, an officer of the State of Michigan, may not waive such defense. Moreover, the failure to plead the defense of soverign immunity cannot create a cause of action where none existed before."

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> "In the absence of constitutional provision or statute a private individual cannot maintain an action against a sovereign state." *Wilkinson v. State et al.,* 42 Utah 482, 134 P. 626.

A city's immunity from liability for tortious acts of the city or its employees and servants cannot be waived except by act of the Legislature.

In *Christie vs. the Board of Regents, University of Michigan,* 111 N.W. 2nd 30, 364 Mich. 202, holds:

> "Plaintiff, which is suing an apparently immune public body on allegation of tort liability, must allege facts which, if true overcome such immunity."

On page 42 of the N.W. Report the Michigan Court quotes with approval a statement from *Maffei vs. the Incorporated Town of Kemmerer,* 80 Wyo. 33, 338 P.2d 808, as follows:

> "We, therefore, hold it is beyond the power of a municipality to waive an immunity which it possesses by virue of its being an arm of the state's government and that any waiver of such immunity must come from direct action of the legislature or through the clear and unmistakable implication of its legislative acts."

> "It has long been recognized in this jurisdiction that a municipal corporation may act both in a private and public capacity and that when performing a public or governmental function it is not subject to tort liability.

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"From time to time certain judicial expressions have been uttered questioning the soundness of that rule as a matter of policy.

"Whatever its desirability or undesirability may be, it has long been firmly established in our law by rulings of a majority of this court. In deference to the principle of stare de cisis we do not feel at liberty to consider its merits or demerits. Any change would be properly within the province of the Legislature." *Ramirez vs. Ogden City,* 3 Utah 2d 102, 279 P.2d 463, at pages 464 and 465; *Davis vs. Provo City,* 1 Utah 2d 244, 265 P.2d 415.

The principle of law controlling the liability of such cases is laid down in *Gillmor vs. Salt Lake City,* 32 Utah 180, 89 P. 714, where this court cited with approval the following quotation from American and English Encyclopedia of Law, page 1193:

"The rule is general that a municipal corporation is not liable for alleged tortious injuries to the persons or property of individuals, when engaged in the performance of public or governmental functions or duties. So far as municipal corporations exercise powers conferred on them for purposes essentially public, they stand as does the sovereignty whose agents they are, and are not liable to be sued for any act or omission occurring while in the exercise of such powers, unless by some statute the right of action be given. And, where the particular enterprise is purely a matter of public service for the general and common good, it makes no difference whether it is mandatory or whether only permitted and voluntarily

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undertaken. A municipal corporation, therefore, is not liable for negligence in the course of work undertaken purely for public benefit and advantage, and not for the benefit of the corporation. Nor is liability incurred by a city in the exercise of its police power in measures adopted for the general health, comfort and convenience of the public."

There is little question but what the court's decision holding that Salt Lake City was acting in a governmental capacity is correct and in the absence of any pleading by the plaintiff to the contrary it will be presumed that the city was acting in a governmental capacity. *Hays vs. Town Board of Cedar Grove,* 30 S.E.2d 726, 126 W. Va. 828, 156 A.L.R. 702.

POINT II

THE PLAINTIFFS DID NOT ALLEGE OR PLEAD ANY FACTS SHOWING THAT THE APPELLANT OPERATED THE SALT LAKE-JORDAN CANAL IN A PROPRIETARY CAPACITY.

Before the plaintiff can recover from the city, not only must it plead facts overcoming the operation of the canal as a governmental function, but must affirmatively plead that the defendant city was operating the canal in a proprietary capacity. This, the plaintiffs, did not do.

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In *Wade vs. Salt Lake City,* 10 Utah 2d 374, 353 P.2d 914, on page 915 of the Pac. Rep., this court said:

> "Nothing is alleged reflecting any other use than that suggested, and we take it *that any purpose other than governmental must be pleaded and be free from legislative inhibition."* (Emphasis added.)

> "Action against a city by a county employee, injured by lawn mower operated by a city employee while they were mowing city park. Law appeal from judgment of common pleas court, which sustained demurrer by city. The court of appeals held plaintiff did not state a good cause of action when sufficient facts were not alleged to charge city was acting in a proprietary capacity." *Ballinger vs. City of Dayton,* 1952, 117 N.E. 2d 469.

The remainder of the points raised in the respondent's petition for rehearing have been thoroughly discussed heretofore in the brief of the Appellant and nothing new is added by further discussion.

It is contended, however, by the appellant that in view of the capacity in which the defendant was acting in operating its canal and lack of pleading on the part of the plaintiffs as to that capacity, the statement made under the respondents' Point 4 is of non-effect and inapplicable.

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CONCLUSION

It is respectfully submitted therefore that the petition of the respondents for rehearing in this matter be denied.

Respectfully submitted,

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