

1962

# Roy F. Tygesen v. Magna Water Co. : Brief of Respondent

Utah Supreme Court

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**IN THE SUPREME COURT  
of the  
STATE OF UTAH**

23 1952

Clerk, Supreme Court, Utah

**ROY F. TYGESEN,**

*Plaintiff and Appellant,*

vs.

**MAGNA WATER COMPANY, AN  
IMPROVEMENT DISTRICT,**

*Defendant and Respondent.*

No.  
9681

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**RESPONDENT'S BRIEF**

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Appeal from Summary Judgment of the Third Judicial District  
Court of Salt Lake County, Utah  
Honorable Judge Ray VanCott, Jr.

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## TABLE OF CONTENT

	Page
Statement of Facts .....	1
Argument .....	3
Point 1. The Court did not err in finding that 17-6-3:11 U.C.A. 1953 did relate to rate resolutions.	3
Point 2. The Court did not err in finding that defendant could adopt rate resolutions for a sewer system. ....	4
Point 3. The Court did not err in failing to con- sider the doctrine of estoppel. ....	5
Point 4. The Court did not err in finding that the plaintiff must contest a rate resolution within a statu- tory period regardless of when defendant sought to enforce the collection of the charges. ....	5
Point 5. The Court did not err in not considering the thirty day limitation as a violation of Section 7 and 11 of the State Constitution. ....	6
Point 6. Judge VanCott did not err in granting a summary judgment at pre-trial. ....	7
Conclusion .....	8

## CASES CITED

Tygesen v. Magna Water, 226 P.2d 127 .....	4, 6, 8
--	---------

## STATUTES CITED

Utah Code Annotated, 1953	
17-6-3:6 .....	6
17-6-3:11 .....	3, 6
Utah Rules of Civil Procedure	
Rule 12-h .....	5
Rule 56-b .....	7

## TEXTS CITED

20 CJS Section 35 .....	4
53 CJS Section 6 .....	4
53 CJS Section 1 .....	4
34 Am. Jur. Section 14 .....	4

# IN THE SUPREME COURT of the STATE OF UTAH

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ROY F. TYGESEN,

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vs.

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*Defendant and Respondent.*

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## RESPONDENT'S BRIEF

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### STATEMENT OF FACTS

The Plaintiff has made certain omissions regarding the facts in this matter and it is deemed necessary to submit a brief statement of the facts. The Defendant on January 1, 1961, did assume the operation of a sewer system which it acquired from Salt Lake County, Utah, under a lease dated November 30, 1960. Defendant subsequently purchased the system. Prior to leasing said sewer system from Salt Lake County, the Defendant did call for and hold a bond election to

raise funds for the construction of a disposal plant and new lines where required throughout both the old and new area so it could provide sewer service wherever possible for people residing within its boundaries.

On December 20, 1960, the Defendant adopted a resolution establishing rates for sewer service and the same was published on December 29, 1960, in the *Magna Times*, a newspaper of general circulation within the district. These rates were effective on January 1, 1961, when Defendant began operating the sewer system under its lease.

The charges for the sewer service were imposed only upon those who received the benefit and those whose property was within 200 feet of an existing, functioning sewer line. Thus charges for sewer service were not imposed upon those who could not receive the benefit of said service.

All of the resolutions pertaining to the acquisition of the sewer system and to the service rates were adopted at public meetings of the board of trustees of the defendant and any interested person had the right to be present at said meetings and to examine the minutes or records of the Defendant at any time during office hours.

The Plaintiff at no time filed a protest or objection as required by statute or otherwise with Defendant, nor did he appear at any of the public meetings and file a protest or an objection questioning the validity of the resolution pertaining to sewer rates.

The Defendant has furnished to the Plaintiff uninterrupted sewer service from January 1, 1961, and Plaintiff has accepted said service. The Plaintiff has been billed monthly for said service by Defendant, but Plaintiff has failed to tender any payment for the sewer service furnished him. Because of Plaintiff's continuing delinquency, Defendant notified him that his water service would be discontinued unless the charges for the sewer service were paid in full. Only then did Plaintiff bring this action which was resolved adversely to him at the pre-trial conference by the Court granting Summary Judgment in favor of the Defendant.

## ARGUMENT

### POINT 1. THE COURT DID NOT ERR IN FINDING THAT 17-6-3:11 U.C.A. 1953 DID RELATE TO RATE RESOLUTIONS.

Section 17-6-3:11 provides as follows:

"The board of trustees may provide for the publication of any resolution or other proceeding adopted by the board in a newspaper published in or having general circulation in the district. For a period of thirty (30) days after the date of such publication, any person in interest shall have the right to contest the legality of such resolution or proceedings or any bonds which may be authorized thereby or by the provisions made for the security and payment of any such bonds, and after such time no one shall

have any cause of action to contest the regularity, formality or legality thereof for any cause whatsoever.”

The Utah Supreme Court in *Tygesen v. Magna Water Company*, 226 P.2d 127, December 28, 1960, used the following language in reviewing 17-6-3:11:

“The above section gives any interested person a right to test the legality of any resolution or order of the board, but limits the time for doing so to 30 days after the publication by the board of such resolution or order. Such limitation period does not start to run until after the publication by the board and until the board does so publish and the 30 days have passed any interest person may apply to the courts to test the legality of the board’s action.”

See also in this regard 20 CJS Section 35, 53 CJS Section 6, 53 CJS Section 1-b, and 34 Am. Jur. Section 14.

It is submitted that the language of the statute and the interpretation thereof by this Court clearly applies to “any resolution” of the board of trustees including one relating to rates.

## POINT 2. THE COURT DID NOT ERR IN FINDING THAT DEFENDANT COULD ADOPT RATE RESOLUTIONS FOR A SEWER SYSTEM.

The Defendant exercised an option to lease the sewer system from Salt Lake County, which lease was fully executed on the 30th day of November, 1960.



This lease provided that the Defendant would assume the operation of the sewer system on January 1, 1961. While the Defendant did not *own* the sewer system on December 20, 1960, when the rate resolution was passed, it did have a possessory, proprietary interest in it under its lease, authorizing and in fact requiring its action in establishing rates effective on the first day it took over operation of the sewer system.

**POINT 3. THE COURT DID NOT ERR IN FAILING TO CONSIDER THE DOCTRINE OF ESTOPPEL.**

The record will show that Plaintiff did not raise the defense of estoppel in his pleadings or at the pre-trial and is asserting it for the first time in this appeal. Therefore, under Rule 12-h of the Utah Rules of Civil Procedure, the Plaintiff waived any possible defense of estoppel. It is respectfully submitted that even if this defense had been raised by Plaintiff it is not supported under the facts of this case.

**POINT 4. THE COURT DID NOT ERR IN FINDING THAT THE PLAINTIFF MUST CONTEST A RATE RESOLUTION WITHIN THE STATUTORY PERIOD REGARDLESS OF WHEN DEFENDANT SOUGHT TO ENFORCE THE COLLECTION OF THE CHARGES.**

The Plaintiff could not assume that he was not to pay for sewer service. Plaintiff was billed monthly for

the service rendered to him and accepted by him. Certainly it was not mandatory for the Defendant to give notice to Plaintiff that his water would be shut off unless he paid his bill in order for Defendant to effect collection for this service. See 17-6-3:6 U.C.A. 1953.

The Plaintiff knew that sewer rates and charges are made for services and benefits received. In *Tygesen v. Magna Water Company*, 226 P.2d 127, the Court said:

“A consumer does not pay for the bonds, he pays for whatever benefit he receives.”

Section 17-6-3:11 U.C.A. 1953, not only gives Plaintiff standing in Court to question the resolution of the board but makes it mandatory that such a suit be brought within 30 days from the date of publication of this resolution.

#### POINT 5. THE COURT DID NOT ERR IN CONSIDERING THE THIRTY DAY LIMITATION AS A VIOLATION OF SECTION 7 AND 11 OF THE STATE CONSTITUTION.

This point also is raised for the first time in this Court and was not raised at any time in Plaintiff's pleadings or at the pre-trial of this case. This point is totally without merit for this Court, in the case of *Tygesen v. Magna Water Company*, 226 P.2d 127, carefully reviewed this very question of the constitutionality of a 30 day statute of limitations and upheld this statute as being constitutional.

## POINT 6. JUDGE VAN COTT DID NOT ERR IN GRANTING A SUMMARY JUDG- MENT AT PRE-TRIAL.

Rule 56-b of the Utah Rules of Civil Procedure provides:

“A party against whom a claim or counter-claim or cross claim is asserted or a declaratory judgment is sought, may at any time move with or without support affidavits for a summary judgment in his favor as to all or any part thereof.”

It is readily acknowledged that a Motion for Summary Judgment was heard and denied by Judge Stewart M. Hansen on the regular Law and Motion calendar, sometime prior to pre-trial. Subsequently, this case then came on regularly for pre-trial pursuant to Rule 16 URCP and the rules of the Third Judicial District Court. Judge Ray VanCott, the pre-trial judge, granted defendant's Motion for Summary Judgment only after a complete review by him of the issues in the case and after affording an opportunity to each side to fully state their position. There was no effort by the defendant to “shop” for a different judge to review the prior ruling of Judge Hansen, and of course the pre-trial court was fully aware of such prior proceeding.

It must be recognized that some trial judges are extremely reluctant to grant Motions for Summary Judgment for a variety of reasons, including a belief by some that such matters can be better and more fully

considered at a pre-trial rather than at a brief hearing on a regular Law and Motion calendar. While one may speculate and wonder why Judge Hansen did not grant the prior motion, this prior ruling did not limit the broad powers of the pre-trial judge to make such disposition of the case then properly and regularly before him for pre-trial as he deemed proper.

## CONCLUSION

Plaintiff's points 1, 3, 4 and 5 were heretofore urged by him and rejected by this Court in *Tygesen v. Magna Water Company*, 226 P.2d 127. Points 2 and 6 are believed without merit for the reasons above. Plaintiff had ample notice of the Defendant's acts and failed to take the required action within the statutory time allowed. It is respectfully urged that the lower Court's decision granting a Summary Judgment in favor of the Defendant should therefore be sustained.

Respectfully submitted,

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