

1967

Richard P. Hampton And Patricia L. Hampton, His
Wife v. State Of Utah: Utah State Road
Commission; Ernest H. Balch; Elias J. Strong;
Francis Feltch; W. J. Smirl; Ames K. Bagley; Utah
State Department Of Highways; C. Taylor Burton :
Brief of Respondents

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In The Supreme Court of the State of Utah

RICHARD P. HAMPTON, and PATRICIA
L. HAMPTON, his wife,

Plaintiffs-
Appellants,

-v-

STATE UTAH; UTAH STATE ROAD
COMMISSION; ERNEST H. BALCH,
ELIAS J. STRONG; FRANCIS FELTCH;
W. J. SMIRL; AMES K. BAGLEY;
UTAH STATE DEPARTMENT OF
HIGHWAYS; C. TAYLOR BURTON,

Defendants-
Respondents.

Case No.
10997

BRIEF OF RESPONDENTS

STATEMENT OF THE NATURE OF CASE

Appellants initiated suit against the State of Utah, the Utah State Road Commission, the Utah State Department of Highways, the Director of the Utah State Department of Highways, and the individual members of the Utah State Road Commission, wherein appellants sought to recover damages allegedly resulting from certain construction activities adjacent to appellants' property or, in the alternative, to enjoin respondents from such activ-

ities. The activities giving rise to appellants' action consisted of the construction of an access control fence and guard rail facility on property not owned or claimed by appellants but adjacent thereto.

DISPOSITION IN THE LOWER COURT

Subsequent to the filing of appellants' complaint, respondents sought a motion to dismiss on the grounds that the lower court lacked jurisdiction over respondents on the grounds and for the reasons that the respondents were immune from suit. After some delay, the lower court entered a ruling dismissing appellants' complaint on the merits and with prejudice.

RELIEF SOUGHT ON APPEAL

Respondents submit that the dismissal of appellants' complaint should be affirmed.

STATEMENT OF FACTS

Respondents basically agree with the statement of facts as set forth in appellants' brief. However, the following summary of the allegations contained in appellants' complaint should be noted. Count I of appellants' complaint seeks damages allegedly caused by the negligent, careless and reckless manner in which the construction activities were accomplished. Count II of appellants' complaint alleges an easement of ingress and egress acquired by appellants through the use of the public street abutting

the front of appellant's property. Count II further alleges that the construction of the access control fence and guard rail facility reduced or destroyed the effectiveness of this easement. Count III of appellants' complaint alleges a nuisance theory and Count IV alleges fee title to appellants to the middle of the public highway abutting the front of appellants' property. Count V of appellants' complaint seeks an injunction against respondents to enjoin respondents from further interfering with appellants' alleged right of access and easement, an order requiring respondents to remove the access control fence and guard rail facility constructed adjacent to appellants' property, or, in the alternative, an order requiring respondents to institute condemnation proceedings to assess the damages and compensation due appellants by virtue of the construction activities.

It must be noted that at the time service of process was executed on respondents, October 28, 1964, the alleged interferences with appellants' property rights, i.e., the access control fence and the guard rail facility, were an accomplished fact.

POINTS ON APPEAL

POINT I

THE LOWER COURT DID NOT ERR IN DISMISSING APPELLANTS' COMPLAINT.

A. TO PROPERLY CONSIDER THE MERITS OF THE INSTANT CASE, IT IS NECESSARY TO IDENTIFY AND RECOGNIZE THE TYPE

OF PROPERTY RIGHT OR INTEREST ALLEGEDLY APPROPRIATED BY RESPONDENTS.

B. THE ALLEGED DAMAGES COMPLAINED OF BY APPELLANTS ARE NOT SUBJECT TO JUDICIAL REVIEW.

C. SEVERAL CONTENTIONS ASSERTED BY APPELLANTS ARE TOTALLY WITHOUT MERIT AND MAY BE DISPOSED OF SUMMARILY.

ARGUMENT

POINT I

THE LOWER COURT DID NOT ERR IN DISMISSING APPELLANTS' COMPLAINT.

A. TO PROPERLY CONSIDER THE MERITS OF THE INSTANT CASE, IT IS NECESSARY TO IDENTIFY AND RECOGNIZE THE TYPE OF PROPERTY RIGHT OR INTEREST ALLEGEDLY APPROPRIATED BY RESPONDENTS.

Respondents agree with appellants that, for the purposes of an appeal arising from the granting of a motion to dismiss, the appellate court accepts the facts as set forth in appellants' complaint. **Hurst v. Highway Dep't**, 16 Utah 2nd 153, 397 P.2d 71 (1964). Initially, however, respondents submit that as a matter of law, respondents are immune from suit in each and every allegation contained in appellants' complaint and that appellants totally fail to state a cause of action on which relief may be granted.

To adequately consider the merits of the instant case, it is necessary that appellants' pleadings be examined to determine the type of property right or interest allegedly appropriated by respondents. In this regard, it is of the utmost importance to recognize that appellants do not allege the taking of any real property contained within the legal description of appellants' property deed. Therefore, the only possible property rights or interest that have allegedly been appropriated by respondents are, (1) the alleged impairment of ingress and egress to appellants' property and (2) the allegation that appellants owned the public street abutting the front of their property to the center line and that respondents have appropriated a portion of that street so owned by appellants.

As to the allegation that appellants own the public street abutting the front of their property to the center line, respondent submits that such allegation is totally without merit. This allegation is evidently based on the incorrect assumption that there has been an abandonment of the public street abutting the front of appellants' property. The lower court did not err in refusing to consider this allegation because there has been no abandonment as a matter of law.

Therefore, based on the pleadings, the type of property right or interest allegedly appropriated by respondents is the alleged damage to or destruction of appellants' claimed easement of ingress and egress.

**B. THE ALLEGED DAMAGES COMPLAINED
OF BY APPELLANTS ARE NOT SUBJECT TO
JUDICIAL REVIEW.**

It must first be noted that for the purposes of this appeal, respondents are willing to concede that whatever damages appellants could prove by virtue of the alleged interference with the easement of access could be considered compensable under the damage provision of Utah Const. Art. I § 22. However, this concession does not alleviate the problem for the instant case raises the issue as to the proper procedure to be pursued by appellants in satisfying their claim. Respondents submit that if compensation is due appellants, it must come from the Utah State Board of Examiners and the Utah State Legislature, and not through the courts.

A distinction has developed between private property taken for public use and private property damaged by and through public use. This basic distinction has further developed into a segregation of the remedial procedures available to an aggrieved party.

This developed distinction, which has evolved into the established law in this jurisdiction, had as its inception the eloquent dissent of Chief Justice Wolfe in **State by State Road Comm'n v. District Court, Fourth Judicial District**, 94 Utah 384, 78 P.2d 502 (1937). In that case the court considered the construction by the Utah State Road Commission of a viaduct structure that deprived the abutting landowners of convenient access, light, air, and

view (94 Utah 388). The court concluded that although the Utah State Road Commission, as an agency of the State of Utah, was immune from suit, the individual road commissioners could be enjoined from the alleged infliction of consequential damages on the basis that Utah Const. art I § 22, was self-executing (94 Utah 397). In his dissent, Chief Justice Wolfe took the authoritative position that Utah Const. art. I, § 22, was substantive and not procedural. As justification for this position the Chief Justice reasoned that while compensation is guaranteed by that constitutional provision the procedure to be employed in satisfying the compensation requirement is not set forth. That constitutional provision does not guarantee that compensation shall be first paid before damage occurs. It guarantees only that upon damage, compensation will be paid.

In discussing the evolution of the definition of the terms "taken or damaged" as found in Utah Const. art. I, § 22, Chief Justice Wolfe recognized that prior to 1870, only the word "taking" was included within the constitutional provisions. This necessitated an expansion of the definition of the word "taken" to include instances of not only a physical take, but also cases where the use or enjoyment of the property was so impaired as to be tantamount to a take. However, because of the subsequent inclusion of the word "damaged" in state constitutions, it became necessary to maintain the expanded definition of the word "taken."

As stated by Chief Justice Wolfe at 94 Utah 408:

The remedy to prevent a 'taking' without agreed compensation or condemnation would be injunction because such taking would be without authority. The remedy for damages caused by an agency of the State performing its functions would be enforced as it is enforced in all other cases against the State where remedy is not specifically given by statute, to wit, by resort to the board of examiners.

In summarizing his position, Chief Justice Wolfe stated at 94 Utah 434, 435:

Sec. 22, Art. I, of our Constitution, guarantees persons whose property is taken or damaged for public use just compensation, but there is no guarantee that compensation be first paid before the damage.

* * *

Whether the Road Commissioners were suable depends upon whether they were in fact acting lawfully for a state agency authorized to do the work the Road Commissioners were doing.

The Road Commissioners were not acting outside of their authority when they, by constructing the viaduct on the state highway, caused consequential injuries to abutting owners as described in the complaint for an injunction.

The Road Commission is subject to the due process clauses of both Federal and our State Constitutions, but if the use is a public one the fact that proprietors whose property is "damaged" consequential to an improvement of the highway by the Road Commission, as distinguished from a "taking," are compelled to go to the Board of Examiners for inquiry and ascertainment of the damage instead of a court, does not withdraw from such proprietors the protection of due process.

This distinction between the "taking" and "damaging" of property received recognition in **State by State Road Comm'n v. Rozzelle**, 101 Utah 464, 120 P.2d 276 (1941), wherein this court stated at 101 Utah 467:

To the extent that the present taking or construction so violates condemnee's rights, he is entitled to recover; but be the loss what it may it must have a causal connection with the taking of the property or the construction thereon. [Emphasis added.]

Several recent cases also serve to illustrate this distinction. In **Fairclough v. Salt Lake County**, 10 Utah 2d 417, 354 P.2d 105 (1960), this court considered an action by abutting property owners for damages accruing when the Utah State Road Commission constructed a highway project on a reduced grade of sixteen feet below the abutting property. This court held that sovereign immunity constituted a bar to the action.

In **Springville Banking Co. v. Burton**, 10 Utah 2d 100, 349 P.2d 157 (1960), this court held that mandamus would not be available to compel the individual members of the Utah State Road Commission to initiate condemnation proceedings for damages allegedly caused by the impairment of the ingress to and egress from private property.

In **State v. Parker**, 13 Utah 2d 65, 368 P.2d 585 (1962), the fundamental question was whether the State was suable for consequential damages to property not sought for condemnation. This court

concluded that the State was not suable under the circumstances and also recognized the necessity of a causal connection between an impairment of ingress and egress and the actual physical taking of property.

Also, in **Hurst v. Highway Dep't**, 16 Utah 2d 153, 397 P.2d 71 (1964), this court held that sovereign immunity was a bar to an action for damages and injunctive relief against the operation of a gravel pit belonging to the State and allegedly constituting a nuisance. See also **Sine v. Helland**, 18 Utah 2d 222, 418 P.2d 979 (1966).

The common denominator in these cases is the fact that there was not an actual physical appropriation of private property. Rather, the damages resulted from operations and activities adjacent to the private property. In every instance, this court concluded that judicial recourse was not available to the aggrieved party. These findings illustrate and solidify the position taken by Chief Justice Wolfe in **State by State Road Comm'n v. District County, Fourth Judicial District, supra**, that Utah Const. art. I, § 22, is substantive and not procedural. If Utah Const. art. I, § 22, was procedural, judicial recourse would be available to the aggrieved party. However, this is clearly not the case.

The next consideration is whether Utah Const. art. I, § 22, is self-executing. This consideration is basically intertwined with the consideration as to whether the constitutional provision is substantive or procedural in that, if it is found to be self-execut-

ing, it must necessarily be a foundation on which to justify judicial review.

This consideration was adequately answered in **Fairclough v. Salt Lake County, supra**, wherein this court stated at 354 P.2d 106:

... 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.

The above-cited cases have established that the term "taken" as found in Utah Const. art. I § 22, is applicable only where there has been a direct physical appropriation of private property. Where there is a direct physical appropriation of private property without just compensation, judicial review may arguably be available to the aggrieved party because the state agency, in so acting, did so without authority. However, where private property is consequentially damaged by virtue of the construction of a public improvement, judicial review is not available to the aggrieved party. Under such circumstances, the proper course of procedure is to present the matter to the Utah State Board of Examiners and the Utah State Legislature.

A full recitation of authorities is not necessary for the proposition that the Utah State Road Commission, as an agency of the State of Utah, is immune from suit until consent is given. It is also well

established that Utah Const. art. I, § 22, does not operate as either an express or implied waiver of immunity. **Fairclough v. Salt Lake County**, *supra*. To this principle is added the proposition that a suit against a public officer is in reality a suit against the State unless the public officer acted beyond the scope of his authority. **Wilkinson v. State**, 42 Utah 483, 134 Pac. 626 (1913). There being no conceivable basis on which to say the construction of the access control fence and guard rail facility were not accomplished pursuant to the authority vested in respondents, the instant case is obviously a suit directed against agencies and public officers vested with sovereign immunity.

In summary, respondents submit that the instant case does not present a situation whereby private property has been taken, physically appropriated, for a public improvement without just compensation. If such was the case, a suit may arguably be maintained because respondents acted beyond the scope of their authority. However, in the instant case, the situation is one of an alleged damage to an access easement. The firmly imbedded doctrine of sovereign immunity precludes judicial intervention in matters involving consequential damages of this nature. Utah Const. art. I, § 22, is substantive and not procedural, and also not self-executing and does not serve as a foundation on which to predicate judicial review. Absent a physical appropriation, the only recourse available to appellants is a presentation of their claim to the Utah State Board of Examiners and the Utah State

Legislature. This court has no alternative but to affirm the lower court's dismissal of appellants' complaint.

C. SEVERAL CONTENTIONS ASSERTED BY APPELLANTS ARE TOTALLY WITHOUT MERIT AND MAY BE DISPOSED OF SUMMARILY.

In the course of their brief, appellants make certain assertions which respondents submit are totally without merit. In an effort not to overburden this court with undue rhetoric, respondents will attempt to summarily dispose of these issues.

Appellants allege that the instant case comes within the purview of the Utah Governmental Immunity Act, Utah Code Ann. §§ 63-30-1 to -34 (Supp. 1967). However, appellants fail to recognize that the Utah Governmental Immunity Act applies only to claims and actions arising after July 1, 1966. The construction activities complained of by appellants, i.e., the construction of the access control fence and guard rail facility, were accomplished facts in October of 1964 when service of process was executed on the respondent. Therefore, appellants' claim arose before July 1, 1966.

Also, it must be noted that appellants' reliance on the Utah Governmental Immunity Act is defeated by the provisions of the act itself. Utah Code Ann. § 63-30-12 (Supp. 1967), requires that a claim against the State must be preceded by notice thereof filed with the Attorney General of the State of

Utah and that such claim is forever barred unless the notice is filed within one year after the cause of action arises. Appellants' allege to have given notice to the State of Utah in 1964, but fail to appreciate that the Utah Governmental Immunity Act was nonexistent in 1964. Thus, even if the Utah Governmental Immunity Act applied to the facts of the instant case, which respondents' vigorously deny, it must be conceded that the appellants have failed to exhaust their administrative remedies in filing a proper notice with the Utah State Attorney General's office for consideration of their claim. The notice given in 1964 is insufficient to comply with the provisions of the Utah Governmental Immunity Act which was not effective until July 1, 1966.

It may also be noted that the Utah Governmental Immunity Act provides a blanket immunity to all governmental entities except as that immunity is withdrawn by the Utah Governmental Immunity Act. (Utah Code Ann. § 63-30-3) (Supp. 1967). The type of action pursued by appellant in the instant case, not specifically exempted from the blanket of immunity, is barred.

One additional problem must be considered in that appellants seek to enjoin the individual members of the Utah State Road Commission. Appellants' reliance on **State by State Road Comm'n v. District Court, Fourth Judicial District, supra**, is obvious. The justification given by this court in the issuance of the injunction in that case was on the

theory that Utah Const. art. I, § 22, was self-executing (94 Utah 397). As noted above, Mr. Chief Justice Wolfe logically annihilated the justification given by the majority based principally on the fact that Utah Const. art. I, § 22, is substantive and not procedural. Also, it is well established that Utah Const. art. I, § 22, is not self-executing.

Any reliance which appellants may give to **Shaw v. Salt Lake County**, 119 Utah 50, 224 P.2d 1037 (1950), as support for the issuance of an injunction is misplaced. In **Hurst v. Highway Dep't, supra**, an application for an injunction on a theory of nuisance was denied. This court stated at 397 P.2d 74:

We have concluded as indicated in this decision regardless of what may have been said in the case of **Shaw v. Salt Lake County**. . . .

Also, the propriety of an injunction issued against the individual members of the Utah State Road Commission is no longer at issue in the instant case because the complained of acts, i.e., the construction of an access control fence and guard rail, are already an accomplished fact. This is admitted in appellants' complaint and brief.

The inconsistency between those decisions which do not allow personal liability for damages, **Hjorst v. Whittenburg, supra**; mandamus to compel eminent domain proceedings, **Springville Banking Co. v. Burton, supra**, **Fairclough v. Salt Lake County, supra**; the dismissal of a counterclaim on the grounds that a counterclaimant could not be in

a better position than a plaintiff, **State v. Parker, supra**, and allowing that which appellant seeks in the instant case is obvious and intolerable.

CONCLUSION

Based on the absence of a direct physical appropriation of appellants' property and the applicability of the rule that sovereign immunity precludes judicial review of consequential damages such as alleged in the instant case, respondents submit that the dismissal of appellants' complaint should be affirmed.

Respectfully submitted,

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