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Thomas G. Hurst and Louis V. Hurst v. State of Utah et al : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

THOMAS G. HURST and LOUISE V. HURST, his wife,

Plaintiffs,

vs.

THE STATE OF UTAH, operating by and through the Department of Highways, and ROBERT V. BURGRAFF CONSTRUCTION COMPANY,

Defendants.

CASE NO. 10,089

APPELLANT'S BRIEF

Appeal from Judgment of the Fourth District Court
of Utah County
HON. R. L. TUCKETT, Judge

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TABLE OF CONTENTS

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BRIEF OF APPELLANT

STATEMENT OF NATURE OF CASE

This is an action against the Defendant, State of Utah, for an injunction restraining as a nuisance the operation and maintenance of a gravel pit located near Appellants' home.

DISPOSITION IN LOWER COURT

The lower court upon a motion to dismiss, made by Defendant, State of Utah, and upon oral argument of the same, granted said motion and Plaintiff appeals.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the lower court's order granting Defendant's State of Utah, motion to dismiss.

STATEMENT OF FACTS

The Plaintiffs are owners of certain real property located in Orem City, Utah County, State of Utah. On this property, the Plaintiffs have their home, which they maintain for themselves and for other members of their immediate family. Plaintiffs have resided at this location for a number of years and wish to continue to do so if at all possible.

The Defendant, State of Utah, is the owner of certain real property located in Orem City, Utah County, State of Utah, which property is within a very short distance from the Plaintiffs' home. This property owned by the Defendant, State of Utah, is designated by said Defendant as property which may be used by contractors doing work for the State of Utah as a source of supply for their gravel requirements. When the pit is so used, the gravel plant and other construction equipment are moved into the area, and a gravel producing operation begins. At the present time, the property is being used as a source of supply by the Defendant, Robert V. Burgraff Construction Company in performance of a contract for surfacing Interstate 15 for the Defendant, State of Utah. This particular operation as continued for a long period of time, thousands of tons of gravel and waste material having been taken from this area, and many thousands of tons of waste material being stockpiled as a result of this operation within a very short distance from the Plaintiffs' property.

As a result of the operation and maintenance of this gravel pit, the Plaintiffs have found that living at their home has become almost unbearable. During the periods in which the gravel plant itself is in operation, huge amounts of dust and smoke are emitted into the air and are blown over onto the Plaintiffs' property and into their living quarters. In addition to this, even when the plant is not operating, the fact that many thousands of tons of waste material have been stockpiled at such a close proximity to the Plaintiffs' property, if the wind is blowing in the right direction, it also blows great amount of dust and rocks into the Plaintiffs' living quarters and onto their property, making life most unpleasant for them and their family. Not only does the operation of the plant cause great amounts of dust and smoke, but it also generates a great amount of noise, which makes it impossible at times for the plaintiffs to sleep and to carry on a conversation in an ordinary tone of voice. This noise continues during certain periods of time from as early as 6:00 A. M. until 3:00 A. M. the following morning.

The Plaintiffs have been informed by the Defendant, State of Utah, that it contemplates the future and further use of the premises for the production of rock products and that it contemplates designating the pit for further contract and project operations. Under these circumstances, the Plaintiffs feel that the continued operation of this gravel pit is a nuisance which can be enjoined by the courts of this state, notwithstanding the fact that the Defendant is the State of Utah.

ARGUMENT

POINT I

THE COURT ERRED IN GRANTING DEFENDANT'S, STATE OF UTAH, MOTION TO DISMISS UPON THEORY OF SOVEREIGN IMMUNITY.

The Plaintiffs, in open court, dismissed their claim for damages against the State of Utah, leaving their prayer for relief restricted to injunction. The record will disclose that the Defendant, State of Utah's motion to dismiss was granted by the lower court upon the following basis: That the State of Utah had not consented to be sued, and therefore, the doctrine of Sovereign Immunity precluded this action for injunctive relief. This view of the law, we respectfully submit, is in error.

This action, it must be remembered, is not one seeking damages from the State of Utah, but an action seeking an injunction against the State for maintenance of a nuisance. It is clearly the law of the State of Utah that the operation and maintenance of a gravel pit or quarry can be a nuisance under certain circumstances, particularly where that gravel pit or quarrying operation takes place within a close proximity to a residential area.

Cases decided by this court dealing with the operation of asphalt plants, gravel plants, and various quarrying operations and holding the same to be nuisances are as follows: **Shaw, et al. vs. Salt Lake County, et al.,** 119 Utah 50, 224 Pac. 2nd, 1037; **Draper, et al. vs. J. B. and R. E. Walker Incorporated,** 121 Utah 456, 244 Pac. 2nd, 630; **Thackeray vs. Union Portland Cement Co.,** 64 Utah 439, 231 Pac. 813.

The record will further disclose that counsel for the Defendant, State of Utah, cited many cases to the lower court dealing with the doctrine of Sovereign Immunity; however, it will be noted that all of those cases were ones dealing with an action brought against the State of Utah for damages, or in the alternative, some form of injunctive relief to force the State of Utah into the payment of damages for taking or damaging particular property involved. That is not the situation that we have in the present case. The Plaintiffs are not seeking damages from the State of Utah, and the injunction which is sought is one to enjoin the maintenance of a nuisance which threatens the health of Plaintiffs and their family and further threatens the peaceful use and enjoyment of their property. The Defendant, State of Utah, failed to cite any authority to the lower court with respect to an action for injunctive relief against the State for the abatement of a nuisance.

The only case decided by the Supreme Court of this state dealing with injunctive relief against a governmental unit for maintenance of a nuisance is a case completely compatible and in complete support of the Plaintiffs' position in this case. That case is **Shaw, et al. vs. Salt Lake County, et al.,** 119 Utah 50, 224 Pac. 2nd 1037. This was an action brought by Plaintiff against the Defendant, a governmental unit, and its officers to enjoin as a nuisance an asphalt plant and operations for extracting and processing gravel, including a rock crusher, in a residential area. The proximate location of this particular area was from Holladay Street on the North to and including homes on 6200 South, and from Wasatch Boulevard on the

East to Highland Drive on the West. This area was formerly known as the Cottonwood District in Salt Lake County. The county had leased a particular piece of property from one Harper to be used as a location for a hot plant and gravel operation. The materials produced at this site were going to be used in resurfacing and surfacing roads in the Salt Lake County area. Before the gravel plant or asphalt plant could be assembled by the Defendant, the Plaintiffs brought the action, and injunction was issued by the trial court in favor of the Plaitiffs. The injunction was upheld by the Supreme Court. The Court first deals with the appropriateness of granting an injunction under these circumstances. They said:

> "The purpose of an appeal to a Court of Equity for an injunction against the creation or operation of a nuisance is that the applicant has no speedy and adequate remedy at law. In the present case, the Plaintiff sought to restrain the creation of a nuisance, which would impair their property rights and for which damages would provide no adequate compensation, even assuming they could be obtained. **The principle of Sovereign Immunity is not one which allows the sovereign to continue to inflict injury, but rather, one which absolves the sovereign from responding in damages for past injuries. It does not give the sovereign the right to totally disregard the effects of its actions upon the public or adjoining property owners."** (Emphasis added)

The Defendants in the Shaw case sought to escape the effects of injunction by claiming that the public good which resulted from the locating of the asphalt plant and gravel operations at this paticular site outweighed any

harm which resulted to the various Plaintiffs. In this regard, the Court said:

> "This Court recognizes that in some instances, the public good may outweigh the injuries to private rights and thus allow the Court in its discretion to refuse an injunction, just as it may in cases involving purely private rights. It does not appear, however, in this case, that substantially identical operations could not be engaged in sufficiently close by to effect the same purposes as the proposed operations on the Harper property would effect, and without causing injury to the Plaintiffs. * * *
>
> **In the absence of a showing which would justify the invoking of a doctrine of balancing the equities as between public good and private rights, we are constrained to rule against the appellants on this point."** (Emphasis added)

It is therefore clear from the above authority, and we emphasize the only authority in the State of Utah that has come down from this Court, that the doctrine of Sovereign Immunity does not shield the State against a suit for injunction to enjoin the operation and maintenance of a nuisance.

We respectfully submit that the Shaw case applies with equal vigor to both the State and County. A review of the statutes creating counties in this state will show that the counties are constitutionally created governmental units. (Article XI, Sec. 1, Utah State Constitution). They exist solely by the same instrument that creates the state government and there is no other charter issued to the county. This Court, when speaking of the immunity involved does not talk of the doctrine as being county im-

munity or municipal immunity, but the doctrine is universally known as sovereign immunity. Sovereign power is equally reposited in the county as in the state and therefore the Shaw case, although it dealt with an injunction against the county, applies with equal force to an injunction sought against the State of Utah.

CONCLUSION

The Appellant respectfully urges this Court to find that the order of dismissal in favor of the Defendant, State of Utah, was erroneous and without basis for the following reason: This Court has clearly and fully set forth in a prior decision the law of this state with respect to suits for injunctive relief against the state. That prior decision held that the doctrine of Sovereign Immunity did not protect the state against a suit for injunctive relief to abate a nuisance. Therefore, this decision controls the situation as found in the present case, and the order of dismissal was in error.

Respectfully submitted,

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