1964

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

Utah Supreme Court

Jackson B. Howard; Attorney for Plaintiffs-Appellants;
A. Pratt Kesler; Attorney for Defendant-Respondent;

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 B. BURGRAFF CONSTRUCTION COMPANY,
Defendants.

Case No. 10,089

BRIEF OF RESPONDENT

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

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STATEMENT OF NATURE OF CASE

Plaintiffs allege in their complaint two causes of action: (1) That Defendant State of Utah owns a gravel pit next door to plaintiffs' home and that said gravel pit is operated by Defendant Burgraff Construction Company; that the use of the gravel pit is damaging plaintiffs' property and that defendants should be restrained from using the gravel pit. (2) That defendant's operation has been willful and negligent, and unskilled, and creates a nuisance. Therefore, plaintiffs ask for compensatory damage of $25,000.00 and punitive damage of $25,000.00.

DISPOSITION IN LOWER COURT

Defendant State of Utah made a Motion to Dismiss plaintiffs' complaint on the grounds that the court did not

have jurisdiction over the Defendant State of Utah, the State being immune from this type of action and had not consented to be sued. The Defendant, Robert B. Burgraff Construction Company moved to dismiss and in the alternative to strike the part of plaintiff's complaint dealing with punitive damages. The District Court granted Defendant State of Utah its Motion to Dismiss as to the State, and denied Defendant Burgraff Construction Company's Motion to Dismiss as to it, but granted its Motion to Strike the provision as to punitive damages. The Defendant Robert Burgraff Construction Company filed its Answer. Plaintiffs brought this appear from the Lower Court's Order dismissing the complaint against the State of Utah.

RELIEF SOUGHT ON APPEAL

The plaintiffs seek to have the Lower Court's Order dismissing the complaint against the State of Utah reversed and the State of Utah re-instated as a party defendant.

STATEMENT OF FACTS

This Respondent agrees with the first two paragraphs of plaintiffs' Statement of Facts and can amplify them somewhat.

The gravel pit has been owned by the State since 1959, and consists of approximately 48 acres. This pit is situated near several other gravel pits, and has been in fairly constant use since it was acquired. The State does not operate the property, but merely makes it available to contractors for their use in the construction of highways.

The Robert Burgraff Construction Company has removed approximately 106,000 cubic yards of material from this site as of September, 1963.

The area is zoned by city ordinance as a residential area, but stipulates that sand, clay or gravel may be removed.

Respondent does not know about the facts stated in the third paragraph of appellants' Statement of Facts, but for the purposes of this appeal assumes them to be so.

As to the fourth paragraph, the State does contemplate the continued lawful use of its property for the purposes for which it was acquired; but does not attempt to draw the legal conclusion that said operation is a nuisance as felt by appellants in their brief, but not alleged by appellants in their complaint.

ARGUMENT

POINT I.

UNDER THE FACTS AS ALLEGED IN PLAINTIFFS' COMPLAINT THE DISTRICT COURT OF UTAH COUNTY HAS NO JURISDICTION OVER THE STATE OF UTAH.

Section 27–12–9, U.C.A. 1953, as amended, reads as follows:

> "By its name the commission may sue, and it may be sued only on written contracts made by it or under its authority."

It is a well recognized rule that the State is immune from suit for damages without legislative consent. See *Wilkinson v. State*, 42 Ut. 483, 134 Pac. 626 (1913); *State vs. Fourth District Court*, 94 Ut. 384, 98 P.2d 502 (1937); *Campbell Building Co. vs. State Road Commission*, 95 Ut. 242, 70 P.2d 853 (1937); *Bingham v. Board of Education*, 118 Ut. 582, 232 P.2d 432; *Hjorth v. Whittenburg*, 121 Ut. 324, 241 P.2d 907 (1952); *State vs. Tedesco*, 4 Ut. 2d 31, 286 P.2d 75 (1955); *Jopes vs. Salt Lake County*, 9 Ut. 2d 297, 243 P.2d 728 (1959); *Springville Banking Co. v. Burton*, 10 Ut. 2d 100, 349 P.2d 157 (1960); *Fairclough vs. Salt Lake County*, et al, 10 Ut. 2d 417, 354 P.2d 105 (1960);

State Road Commission vs. Joseph A. Parker, et al, 368 P.2d 585 (1962).

This doctrine was also apparently recognized by the appellants in this action in that they indicate that they have dismissed their claim, or cause of action, wherein they were asking for damages against the State of Utah, leaving their prayer as they state for relief restricted to injunction. This contention will be argued later.

It is also fairly well settled that the State cannot be enjoined by the courts for consequential damages. This theory was set forth particularly in the case of *State vs. Fourth District Court,* supra, in which the plaintiffs sought to enjoin the State Road Commission from constructing a viaduct until plaintiff was compensated for damages, because of the interference, or alleged interference, with air, light and view, and access. The court held:

> "The State Road Commission is an agency of the State . . . Being an unincorporated agency of the State, a suit against it is a suit against the State. The State cannot be sued unless it has given its consent or waived its immunity. Defendants do not argue in their briefs that consent has been given by the State, or that there has been any waiver of the State's immunity from suit. Their argument is that the injunction suit is not against the State. We cannot agree with this argument insofar as the Road Commission as such is concerned. It is an agency of the State, and a suit against it is a suit against the State."

Much of what was said in the Fourth District Court case, supra, has been reversed in later decisions. See *Hjorth v. Whittenburg* and *Springville Banking Co. vs. Burton,* supra, but the pronouncement of the court regarding immunity of the State from an injunction proceeding, in regard to this type of action, has not been reversed and stands as a clear statement of the rule in this jurisdiction.

Justice Wolfe amplified the rule when he stated that:

"Neither the Road Commission nor the individual Commissioners could be restrained from inflicting consequential damages." (Hjorth v. Whittenburg, supra).

The rule about injunctions against consequential damages, set forth in the Fourth District Court case, was recently affirmed in the case of the *Springville Banking Co. vs. Burton*, supra, wherein the plaintiff attempted by mandamus to require members of the Road Commission to compensate alleged damages resulting from highway construction. Our Court stated:

(1) "Can plaintiff, employing the extraordinary writ of mandamus, compel the state or pay damages when because of sovereign immunity, it could not have done so in a direct suit against the State or the Road Commission?

"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." (*Springville Banking Co. vs. Burton,* supra).

Mandamus in this case was referred to as an injunctive proceeding.

The appellants in the present action claim that these cases are not applicable to the present situation in that this is not a suit for consequential damages, but is a suit to enjoin a nuisance. It is the respondent's contention that this is just another attempt by appellants to try to do indirectly what this court has held continually could not be done directly. There is no question but what the State can be enjoined in regard to a direct taking when they take a piece of property without compensation. To allow a party to bring an action for an injunction in the circumstances in the present case, is to allow a party to bring an action for a consequential damage for the facts alleged by appellants are not such that would indicate anything but a consequential damage.

How do you distinguish between nuisance and a consequential damage? What definitive terms can be utilized to distinguish between a damage to property, when no part thereof is taken, or a damage to property by reason of an alleged nuisance? This court, in the case of *Springville Banking Co. vs. Burton,* supra, in answer to one of the questions, propounded to itself in regard to this case, wherein the Road Commission placed a concrete island in the middle of the main street eliminating "U" turns and "left" turns to plaintiff's property, the following question:

> (2) "Was the damage here compensable in any event? . . . As to (2): In this era of the freeway, citizens must yield to the common weal, albeit injury to their property may result. We espouse the notion that if the sovereign exercises its police power reasonably and for the good of all the people, when constructing highways, consequential damages such as those alleged here, are not compensable. On the other hand, if public officials act arbitrarily and unreasonably, causing, for example, total destruction of the means to get in and out of one's property, without any reasonable justification for doing so in the public interest, in a manner that imposes a special burden on one not shared by the public generally, principles of equity no doubt could be invoked to prevent threatened action of such character or to remove any instrumentality born of such conduct. Plaintiff did not allege or assert anything akin thereto."

Justice Henroid in his answer to Justice Wade's dissent, in regard to the *Springville Banking Co. vs. Burton* case, concludes by the statement:

> "The United States, since its creation, and the State of Utah, ever since its creation, have never permitted the government to be sued without its consent. This is true whether property is taken for a public use without just compensation or whether the government decides to renege on a contract or obligation. Sovereign immunity is so ingrained in our system of jurisprudence that no case can be found where the government of the United States or the State of Utah was allowed to be sued by implied consent or otherwise for a taking or damaging of property for public use without compensa-

tion. There is no distinction in principle as it related to the United States or the State of Utah."

The question then presents itself — is the type of damage, as alleged in the present action, that which indicates public official acts which are arbitrary and unreasonable, and without any reasonable justification in the public interest, imposed in a manner that creates a special burden on one not shared by the public generally, which would allow a court of equity to invoke its jurisdiction to prevent this type of action?

In the case of *Shaw v. Salt Lake County*, 119 Ut. 50, 224 P.2d 1037 (1950), the court evidently found the type of action that it felt was within this category, and held that it was a nuisance and subject to injunction. It is the respondent's contention that this case is not compelling upon the present case and is distinguishable from the instant situation —

(1) The Shaw case was against the county and not against the state, and the court carefully confined its decision to situations involving municipalities. Not a single case is cited or argued in the decision regarding the State or its agencies.

(2) In the Shaw case the offensive use feared by reason of the gravel pit was the use to be made by the county and not a third party, and the only relief available was against the county. In the instant situation, the Highway Department has simply obtained the gravel location and made it available to the contractor, and it is the contractor, as an independent contractor, who is actually using the site and committing the alleged offensive acts of which the plaintiffs complain. The appellants have an adequate legal remedy, and as such do not have the compelling necessity

for an injunctive-type proceeding. If Defendant Burgraff Construction Company is committing the acts, as alleged by the plaintiffs, such that the contractor is negligent or unskillful in the operation of the gravel pit, they have an adequate legal remedy against the contractor (43 Am. Jur. par. 83, p. 827), and it is apparent that the court has taken this into consideration in that the court did not grant the Defendant Burgraff Construction Company's Motion to Dismiss. And, at the present time the Defendant Burgraff Construction Company has answered.

(3) The Shaw case was an aggravated situation where there were 87 owners in a highly developed residential area, and where there was no apparent adequate remedy at law. In the instant situation only a handful of owners live near this gravel operation, which has been operating for many, many years and only the plaintiffs complain. The fact situation between the Shaw case and the instant situation is not at all comparable.

We are then faced with the problem of what is it exactly that the appellants are asking for? What relief do they want in their action? A careful analysis of their complaint indicates that they have two causes of action stated:

(1) Based upon the defendants' utilization of the property as a gravel pit; the fact that they are using it for mining and excavating; the fact they create noise; the fact that they utilize it early in the morning and late at night; the fact that great amounts of smoke and dust are generated and that the wind can convey it upon the plaintiffs' property, and they claim that the stockpiling of materials is located close to the plaintiffs' property and as such the wind can blow dust and debris upon the plaintiffs' property. In this regard they claim that this type of action damages them

to the extent that they need an order restraining the defendants from the use of their property as a gravel pit. It appears they base this request for the injunction totally upon the damages that results to them from the operation of the gravel pit.

(2) In the second cause of action they rely upon the fact that the operations of the defendants have been willful and negligent, when the defendants were informed and notified of the objections of the plaintiffs', and that the acts and conduct of the defendants in the management of said property has been in such a negligent and unskillful manner as to constitute a nuisance injurious to the health, comfort and safety of the plaintiffs and the enjoyment of their premises. And, in that regard the plaintiffs ask for compensatory damages in the amount of $25,000.00 and ask for punitive damages in the amount of $25,000.00.

Now, in their brief, appellants realizing that they cannot sue the State for damages have dismissed their claim for damages against the State of Utah leaving their prayer for relief restricted to injunction. Nowhere in their cause of action, wherein they ask for an injunction, do they mention the word nuisance. The only relief or claim they have for their complaint is that of damages. And, in the cause of action, wherein they claim a nuisance, nowhere do they ask for an injunction. The only claim for relief that they put forth is for a monetary damage.

Appellants admit that the State of Utah is not an active partner in the operation of this gravel pit. They admit that the State is merely the owner and that it lets the premises out to its contractors for use in the building of highways. Nowhere in the First Cause of Action do they state that the Defendant State of Utah is acting arbitrarily or unreason-

ably, nor do they state that it is acting without any reasonable justification for its acts.

Nuisance as defined in 39 Am. Jur. par. 2, p. 280, states:

> "The nuisance doctrine operates as a restriction upon the right of an owner of property to make such use of it as he pleases. In legal phraseology the term 'nuisance' is applied to that class of wrongs which arises from the unreasonable, unwarrantable, or unlawful use by a person of his own property and produces such material annoyance, inconvenience, discomfort, or hurt that the law will presume a consequent damage."

Nowhere in the present situation is there any allegation that the State of Utah in utilizing its property is acting unreasonably, unwarrantably or unlawfully. Only in their second cause of action, wherein the plaintiffs ask for compensatory and punitive damages, do the appellants allege that the action of the defendants is negligent and unskillful and that the operation is willfully negligent, and in this case it is hard to see where or why the State of Utah, acting in the capacity of a nominal landlord, could possibly be connected with the management of the property and could be held for any negligent or unskillful manner that would create the nuisance complained of by the plaintiffs herein.

It is solely because of these allegations of the negligent and unskillful operation of the gravel pit by the Defendant Burgraff Construction Company that allows the court to retain jurisdiction of the Defendant Construction Company. If such action is negligent or unskillful, then the contractor does not participate in the sovereign immunity of the State. The subject is discussed in 43 Am. Jur., par. 83, p. 827, wherein it states:

> ". . . injuries necessarily incident to performance of contract; nuisances . . . as a general rule, a private contractor in the construction of a public improvement under a contract with duly authorized public authorities is not liable for any injury, direct or consequential, to owners of private property that may result as a

necessary incident from the prosecution of the work in a proper manner, which would otherwise amount to a nuisance. The theory is that one who contract with a public body for the performance of public work is entitled to share the immunity of the public body from liability for incidental injuries necessarily involved in the preformance of the contract, where he is not guilty of negligence. In other words, when the act or failure to act which causes an injury is one which the contractor was employed to do, the injury results not from a negligent manner of doing the work, but from the performance thereof, the contractor is entitled to share the immunity from liability which the public enjoys, but he is not entitled to the immunity of the public from liability where the *injury arises from the negligent manner of performing the work.* Under an agreement on his part to be responsible for any damage or injury resulting from the performance of the work he may not be held liable for results which follow from a performance of the terms of the contract."

It is, therefore, the contention of the Respondent that there is nothing in the complaint that would give to the court jurisdiction. The court acted correctly in dismissing this action against the Defendant, State of Utah.

CONCLUSION

Unless appellants allege such facts to show such arbitrary and unreasonable causing of damage without reasonable justification for doing so in the public interest, in a manner that imposes a special burden on one not shared by the public generally, principles of equity cannot be involved and prevent threatened action of such character or to remove any instrumentality born of such conduct. (*Springville Banking Co. v. Burton*, supra).

Appellants did not allege or assert anything akin thereto that would take this action from without the general rule that a consequential damage cannot be enjoined.

Further appellants' allegation that they are without legal remedy at law, is not substantiated by their complaint, and they in fact allege that they have a legal remedy at law

against Defendant Burgraff Construction Company in their Second Cause of Action, and having an adequate remedy at law appellants are not entitled to an injunction. (*Shaw vs. Salt Lake County*, supra). The District Court must have taken these allegations into consideration in not dismissing the complaint against the Defendant Burgraff Construction Company, thereby allowing plaintiffs to pursue their legal remedy for damages.

Therefore, the Court acted correctly in dismissing this action against the Defendant State of Utah.

Respectfully submitted,

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