

2004

K.J. Achter, Ruth Achter v. Utah Department of Transportation : Reply Brief

Utah Court of Appeals

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UTAH STATE COURT OF APPEALS

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| <p>K. J. and RUTH ACHTER; et al.,</p> <p style="text-align: center;">Plaintiffs/Appellants,</p> <p>vs.</p> <p>THE UTAH DEPARTMENT OF TRANSPORTATION, an agency of the State of Utah,</p> <p style="text-align: center;">Defendant/Appellee.</p> | <p>Court of Appeals No. 20040050-CA</p> <p>Priority No. 15</p> |
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REPLY BRIEF OF APPELLANTS

Appeal from the Third Judicial District in and for Salt Lake County, State of Utah
Third District No. 030912759, The Honorable Sheila K. McCleve

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UTAH APPELLATE COURTS

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DOES I through XX,

Plaintiffs/Appellants,

vs.

THE UTAH DEPARTMENT OF TRANSPORTATION, an agency
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On appeal from an Order of Dismissal by the Third Judicial District Court for Salt Lake County, State of Utah, The Honorable Sheila K. McCleve presiding, granting Defendant's Motion to Dismiss, and entered December 7, 2003.

INTRODUCTION

Defendant/Appellee UDOT's opposing brief begins by suggesting that Plaintiffs/Appellants are not entitled to their costs and attorneys' fees under 49 CFR § 24.107 (and its regulatory adoption by UDOT) in that its initial designation of properties along the Highway 89 corridor (including those belonging to Plaintiffs) was not sufficient, in itself, to constitute "inverse condemnation" under federal case law. In this, however, UDOT ignores the rest of the history in this matter: it *settled* Plaintiffs' claims by *acquiring* Plaintiffs' properties. Under the controlling Utah case law, this moots the question whether an inverse condemnation occurred, and entitles Plaintiffs to their attorneys' fees incurred in the course of settling the proceeding.

UDOT next claims that federal case law mandates a narrow reading of the term "proceeding" under 49 CFR § 24.107, limiting it to actual parties to pending litigation, and attorneys' fees directly arising out of that litigation. The authority cited, however, is without exception based on a separate provision of the Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs Act ("Federal Relocation Act") dealing with federal takings claims under the Tucker Act (28 U.S.C. § 1491, *et seq.*). As is made clear by the Utah Supreme Court in *Robinson v. UDOT*, 2001 Utah 21, 20 P.3d 396 (2001), Plaintiff's claims in this case turn on the language of 49 CFR § 24.107, which is broad enough to reach Plaintiffs' claims in this matter.

UDOT's final argument, that Plaintiffs are defeated in the alternative by the lower court's invocation of the "claim preclusion" doctrine, ignores the procedural predicament in which its own procedural maneuvering has placed the Plaintiffs in this matter. As stated in their opening brief, Plaintiffs were actively involved in the Davis County proceeding (and actually attempted to become nominal parties thereto through amendment of the complaint, an issue never reached before UDOT agreed to a settlement of all claims, including Plaintiffs' claims); however, UDOT managed to obtain from Judge Dawson in the Davis County action a declaration that that court had no jurisdiction over Plaintiffs' claims. Not being before the Davis County court, Plaintiffs cannot be bound by the doctrine of claimed preclusion; they were, however, part of the overall "proceeding" which UDOT expressly settled by agreement with Plaintiffs.

ARGUMENT

POINT I

HAVING SETTLED PLAINTIFFS' CLAIMS FOR COMPENSATION, AND HAVING ACQUIRED THEIR PROPERTY IN THE PROCESS, UDOT MAY NOT NOW BE HEARD TO CLAIM THAT THERE WAS NO VALID "INVERSE CONDEMNATION" CLAIM TO ASSERT.

UDOT's opening argument is, frankly, mystifying. Having agreed to purchase Plaintiffs' properties as part of the Highway 89 expansion project – a project which UDOT has long since stipulated included federal funding – UDOT now suggests, based on a series of federal cases, that Plaintiffs' initial complaint concerning the condemnation of their property through designation thereof as part of the Highway 89 expansion corridor was somehow flawed. Citing a string of U.S. Supreme Court cases standing for the proposition that pre-taking studies and investigations by a condemning agency do not, in and of themselves, give rise to an inverse condemnation claim, UDOT

concludes that Plaintiffs are not entitled to attorneys' fees under 49 CFR § 24.107 because UDOT's initial consideration of their properties do not rise, in and of itself, to the level of a "taking." Simply put, this argument comes far too late.

Once again, 49 CFR § 24.107 (incorporated into UDOT's own regulatory structure under Utah Admin. Code R933-1) reads as follows:

The owner of the real property shall be reimbursed for any reasonable expenses, including reasonable attorney, appraisal, and engineering fees, which the owner actually incurred because of a condemnation proceeding, if:

- (a) the final judgment of the court is that the agency cannot acquire the real property by condemnation, or
- (b) the condemnation proceeding is abandoned by the agency other than under an agreed-upon settlement; or
- (c) the court having jurisdiction renders a judgment in favor of the owner in an inverse condemnation proceeding or the agency effects a settlement of such proceeding.

Applying the foregoing provision, the Utah Supreme Court concluded in the case of *Robinson v. UDOT*, 2001 Utah 21, 20 P.3d 396, that – as a matter of state law, and without having to reach the question of federal law application (see Point II below) – a stipulated settlement of inverse condemnation claims entitles the landowner to the award of costs and attorneys' fees.

As stated in Plaintiffs' complaint herein (R.1-9), they joined with other landowners (including the nominal parties to the Davis County action) in asserting takings claims against UDOT; *those claims were resolved, moreover, by UDOT agreeing to purchase Plaintiffs' properties for incorporation into the expanded Highway 89 corridor.* This allegation is set out in the Complaint (R.1-9) at paragraph 10 (see R.3) and Exhibit A thereto. (This last document, entitled "Corridor

Preservation Fund,” sets out UDOT’s own spreadsheet for approved payments to property owners along the corridor, including Plaintiffs, in exchange for their property interests.)

In short, UDOT has done far more than simply publish a plan suggesting that Plaintiffs’ properties might be impacted by the Highway 89 expansion project. It is engaged in negotiations with Plaintiffs, and bought their properties for the project. It is furthermore without dispute that this purchase was in the teeth of litigation pending in Davis County, and the result of an overall effort at legislative lobbying, litigation and negotiation which cleared the path for property acquisition and project completion. Finally, it cannot be disputed that the Plaintiffs’ properties, as purchased by UDOT, have become part of an actual – not a conceptual or prospective – expansion project. To the extent that Plaintiffs’ legal fees were incurred as part of this “proceeding” (see below), UDOT cannot now belatedly argue that it did not “affect a settlement of such proceeding,” and go back to re-litigating the merits of Plaintiffs’ initial claims.

UDOT, in fact, raised this very argument in the *Robinson* decision, and was rejected for the same reason:

UDOT . . . [argues] that the inverse condemnation proceeding will act to merit. The settlement of such proceeding is covered by the plain language of § 24.107, however, regardless of the merit of the underlying claim. Similarly, it is irrelevant whether UDOT planned to acquire appellants’ property because of the hardship appellants were under and not because it felt the Uniform Act, the federal regulations implementing the Uniform Act, or the Utah Administrative Code compelled it. It remains a settlement of an inverse condemnation proceeding, and, therefore, 49 CFR § 24.107 governs.

20 P.3d at 399.

POINT II

FEDERAL CASE LAW CITED BY UDOT ARISES UNDER A SEPARATE SECTION OF THE FEDERAL RELOCATION ACT, AND IS QUALIFIED AND RESTRICTED BY DIFFERENT STATUTORY LANGUAGE; EVEN SO, HOWEVER, PLAINTIFFS' CLAIMS QUALIFY FOR RECOVERY THEREUNDER.

UDOT next claims that case law relied upon by Plaintiffs in their assertion that they were part of the “proceeding” resulting in the acquisition of their properties is somehow inapplicable. It then turns around and relies upon a series of cases arising out of the United States Claims Court, which address the recoverability of attorneys’ fees by landowners in proceedings under the Tucker Act (28 U.S.C. §§ 1346(a)(2) and 1491). The cases cited, however, (1) interpret a different, and far more restrictive, statutory provision, and (2) in fact support Plaintiffs’ claims in this matter.

A. The Claims Court Cases Interpret 42 U.S.C. § 4654(c), not 49 CFR § 24.107; the language is different and more restrictive in nature.

To begin with, the cases cited in UDOT’s brief do not purport to interpret the language of 49 CFR § 24.107 at all. Instead, they rely upon the following provision of the Uniform Act:

The court rendering judgment for the Plaintiff in a proceeding brought under § 1346(a)(2) or 1491 of Title 28, awarding compensation for the taking of property by a Federal agency, or the Attorney General effecting a settlement of any such proceeding, shall determine and award or allow to such Plaintiff, as a part of such judgment or settlement, such sum as will in the opinion of the court or the Attorney General reimburse such Plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

By its express language, § 4654(c) affords a landowner costs and attorneys’ fees only in a “proceeding brought under § 1346(a)(2) or 1491” of Title 28. This limitation was expressly noted in the decision of *Emeny v. United States*, 208 Cl. Ct. 522, 526 F.2d 1121 (1975), cited at pages 12

through 14 of UDOT's opposing brief. In that case, the court (in concluding that non-litigation attorneys' fees were not recoverable under § 4654(c)), stated the following:

It is my conclusion that the plain language of 42 U.S.C. § 4654(c) precludes the court from including in its award to the Plaintiffs any reimbursement for expenses incurred by the Plaintiffs before they decided to file suit in the court of claims under 28 U.S.C. § 1491.

It will be recalled that the governing statutory provision, previously quoted in this opinion, authorizes reimbursement for those expenses—and only for those expenses—incurred “because of such a proceeding”; and, under ordinary rules of syntax, the quoted phrase obviously refers back to “a proceeding *brought under Section . . . 1491 of Title 28 . . .* for the taking of property by a federal agency” (emphasis supplied).

208 Cl. Ct. at 527 (emphasis in original). The claims court, then, properly noted that, for a landowner to recover fees under § 4654(c), the “proceeding” in question *had to be* a Tucker Act claim brought under 28 U.S.C. § 1491.

49 CFR § 24.107, as adopted by UDOT in its own regulations, is a different provision altogether. Unlike § 4654(c), § 24.107 does not relate, by its terms, to a specific type of “proceeding” but to *any* “condemnation proceeding.” Whether the facts as plead in this matter constitute Plaintiffs as participants in a “proceeding” under § 24.107 is therefore not answered in any way by the claims court decisions upon which UDOT relies. Indeed, federal law cannot make a determination of that question under the terms of the *Robinson* decision, which expressly turned on an interpretation of Utah state law – *see* 20 P.3d at 399.

B. Even cases interpreting 42 U.S.C. § 4654(c) allow enough flexibility to justify this Court in concluding that Plaintiffs were, or may have been, part of a “proceeding” settled by UDOT.

Setting aside the difference in statutory language being construed, the claims court cases cited by UDOT (and even more, claims court decisions which UDOT did not include in its brief) support

the proposition that Plaintiffs in this case were part of a “condemnation proceeding” settled by UDOT, entitling them to fees.

The claims court decisions cited by UDOT predominantly deal with the question whether “pre-litigation fees” in Tucker Act claims are recoverable under 4654(c) of the Uniform Act. The conclusion reached by the decisions is that “pre-litigation” fees *are* recoverable if properly documented (*Yancey v. United States*, 915 F.2d 1534 (Fed. Cir. 1990); *Grantwood Village v. United States*, 55 Cl. Ct. 481 (2003); however, attorneys’ fees incurred in prior, *unrelated* proceedings are not recoverable. (*Preseault v. United States*, 52 Cl. Ct. 1667 (2002)). This distinction, of course, does not reach the facts in the present case, where Plaintiffs began as members of a proposed class to be certified in the Davis County action, thereafter petitioned for an amendment of the complaint to join them as nominal parties, and then participated in an out-of-court settlement of their claims with UDOT before the court ruled on either class certification or pleading amendment. Claims court decisions do make clear, however, that – even under more restrictive language of that section – even significant pre-litigation expenses can be recovered provided they are properly documented. *Yancey v. United States*, cited *supra*. *A fortiori*, therefore, post-filing attorneys’ fees incurred by active (if unnamed) participants in a pending condemnation claim should be recoverable, if properly documented.

Some of the cases cited in UDOT’s brief refer to the decision of *Paul v. United States*, 21 Cl. Ct. 415 (1990). In that decision, the claims court (interpreting even the more restrictive language of § 4654(c), concluded that attorneys’ fees incurred by the landowners in a prior district court case involving the taking of personalty was recoverable, because it was incurred “because of” the Tucker Act proceeding.

The *Paul* decision, moreover, cites to *Foster v. United States*, 3 Cl. Ct. 738 (1983). In the *Foster* decision, the claims court articulated thirteen factors to be considered in awarding attorneys' fees and expenses under § 4654(c):

1. The nature of the undertaking and the character of the services required;
2. The responsibility assumed;
3. The professional repute, standing, ability and experience of counsel;
4. The services rendered, including the time and labor required;
5. The magnitude and importance of the cases;
6. The novelty and difficulty of the questions involved;
7. The opposition encountered;
8. The results accomplished and the benefits flowing to the clients;
9. The professional competence displayed, including skill, industry, and diligence;
10. The fidelity of counsel to the interests of their client;
11. The contingent nature of the employment and the hazards and risks involved;
12. The loss of income and opportunities for other employment due to employment of counsel in the litigation for which compensation is to be awarded; and
13. Customary charges and going rates of attorney's fees for similar services.

At the very least, the thirteen factors articulated in *Foster* present questions of fact which should have been considered by the lower court in this matter. Of particular interest are considerations of novelty and difficulty of the questions involved, the results accomplished and the benefits flowing to the clients, and the professional competence displayed by counsel, including skill, industry, and diligence. It is Plaintiffs' position that their counsel engineered a unique, creative and remarkable

solution to their legal problem in this matter through the use, not only of traditional litigation, but of legislative lobbying and negotiation, to confer a desirable outcome on their behalf through compelling UDOT to purchase their property interests. Even if the claims court line of decisions is considered in this matter, therefore, the lower court erred in simply ignoring all such factors with the observation that, because the Plaintiffs in this action were not named parties to the Davis Court action, they were not part of a “condemnation proceeding.”

POINT III

PLAINTIFFS PROPERLY ADDRESSED THE INAPPLICABILITY OF THE CLAIM PRECLUSION DOCTRINE IN THEIR PRIOR BRIEF.

Plaintiffs recognize that it was both UDOT’s tactic and the trial court’s conclusion that either Plaintiffs *were* parties to the Davis County action (and are therefore bound by claimed preclusion), or they were *not* parties to that action, and therefore had no part in a “condemnation proceeding” entitling them to fees under 49 CFR § 24.107. The explanation in Plaintiffs’ opening brief is not in any way displaced by UDOT’s observation in this regard. Plaintiffs *cannot* be bound under the doctrine of claim preclusion where the Second District Court declined jurisdiction of their claim – by definition, the doctrine applies only to parties to prior litigation or those in privity with them.¹

CONCLUSION

In the *Robinson* decision, the Utah Supreme Court made clear that 49 CFR § 24.107, as adopted by UDOT under Utah Admin. Code R933-1 *mandates* an award of attorney’s fees to those

¹ Plaintiffs certainly do not surrender the claim that Judge Dawson was in error in declining jurisdiction over their attorneys’ fees claim in the Second District Court action, nor do they waive any right of appeal of that ruling following final disposition of the case on its merits. As presently postured, however, the Second District Court action has excluded Plaintiffs’ attorneys’ fee claims on jurisdictional grounds; for that reason, claimed preclusion cannot apply to this case.

landowners with whom UDOT settled in connection with the Highway 89 corridor project. The language in the *Robinson* decision, granted, did not reach the question of attorney's fees incurred by landowners not named as parties in the Second District Court action – that question was not before them at the time. It is submitted, however, that UDOT should not be able to avoid both the express language of § 24.107, and its underlying policy purposes as outlined at 42 U.S.C. § 4621(b) (“... the fair and equitable treatment of persons displaced as a direct result of programs or projects undertaken by a federal agency or with federal financial assistance . . . to insure that such persons shall not suffer disproportionate injuries as a result of programs and projects designed for the benefit of the public as a whole and to minimize the hardship of displacement on such persons”), through the invocation of technical distinctions borne of its own creative timing of settlement in the Davis County action.

For the foregoing reasons, as well as those set out in its opening memorandum, Plaintiffs assert that the lower court's ruling should be reversed and the matter remanded for trial.

Dated this 17th day of August, 2004.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Reply Brief of Appellants was mailed via first class mail, postage prepaid, to the following this 27th day of August, 2004:

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