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# John O. Farnsworth and Sharon Annette Farnsworth v. Soter's Inc. : Reply Brief of Plaintiffs and Appellants

# IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN O. FARNSWORTH and SHARON ANNETTE FARNSWORTH, his wife,
*Plaintiffs and Appellants,*

vs.

SOTER'S INC., a corporation,
*Defendant and Third-Party Plaintiff and Respondent,*

vs.

ROBERT B. SWANER and LOUISE S. SWANER, his wife, SALT LAKE COUNTY, a body politic, and SAM F. SOTER, individually,
*Third-Party Defendants and Respondents.*

Case No. 11626

## Reply Brief of Plaintiffs and Appellants

**Appeal from a Judgment of the Third District Court of Salt Lake County**
**HONORABLE STEWART M. HANSON, Judge**


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## TABLE OF CONTENTS



## AUTHORITIES CITED

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### STATEMENT OF FACT, CORRECTIONS

The defendant contends the road is not contiguous. This is contradicted by plaintiffs. The Defendant contends there were absolutely no other openings. Aerial

photos of government show a number of openings and entrances, one being just a few feet from the northeast corner of the plaintiff property.

The Defendants claim the blacktop in the road was 7 to 14 feet from plaintiffs' line while close examination of Exhibits D-9 and D-19 will show that the fence from which distance was measured was as much as 3 feet inside the section line which was the property line making the distance to the black top three feet shorter in those places.

The Defendants claimed the roadway in front of Jessop's property was left intact, which is not true as one half of the roadway from the middle of the lot to the east end was torn up preventing Jessops from driving in on the west and turning, and coming back on the road on the east without backing their car, which is now necessary. They only left about 39.6 feet of the road intact.

The Defendants contend a pile of dirt was put up in 1960 and they scarified the old road so it was not passable. All of the witnesses testified that the road was usable until 1964 and there was no rebutting testimony to this.

The Plaintiffs saved a one acre piece for building purposes on the old road. There was enough land to put two lots on the north end and two on the south—all 75 feet wide by 150 feet deep.

Plaintiffs were never told of the intended closing and no notice of abandonment was given. The first

plaintiffs knew of the exact time of taking was when the deed from the county was presented in court. The Defendant Soter's Inc. had the county approve a subdivision which took the road and made it a part of the subdivision put plaintiffs' sewer and manhole on Soter's land, making the use of the facilities almost impossible.

## ARGUMENT

### POINT I

### THE DEFENDANT SOTER'S HAS DEPRIVED THE PLAINTIFFS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

It is conceded that the county, under its police power, power, could deed away its rights to the property but that does not deprive the plaintiffs of their rights in the road, and the defendant Soter's Inc. took the county's right in the road subject to plaintiff's claim. It is clear that this road was a public road and had been for more than ten years, and the plaintiffs had a vested right in the road as shown by the statute previously cited, giving them an absolute right to the center of the road.

The case at hand is clearly a suit against defendant Soter's Inc. for depriving plaintiffs of their property without just compensation for the two building lots on the south side of the road, and just compensation therefor would clearly be the market value of the lots.

The defendants make much of the definition of the words abut and abutting and we all know what abut means, but it does not mean that the black top has to run to the property line to make the road an abutting road but only to the place where it can reasonably be used by the public. On Creek Road the old road was as close to the fence line in front of plaintiffs' property as it is to all the other property from 13th East to plaintiffs' land a distance of approximately 1½ miles and for the defendants to contend that every inch of the road was not used from the property line to the black top is carrying the postulate from the sublime to the rediculous. No one is claiming or has claimed the strip between the black top and the fence on any of the rest of the properties on the same side of the road. To be specific, there was never any showing or any claim of use of the land by any other person for the property between the plaintiffs line and the black top.

The defendants make much of the fact that the previous citations used in plaintiffs brief were from condemnation proceedings and they feel that we have misconceived our case. We claim that the cases cited clearly show that property including the specific right of access cannot be taken from a person without just compensation being paid therefor and that practically every state recognizes the right of access as a separate property right for which the owner of the right should be compensated.

They cite the cases of *Fairclough v. Salt Lake County,* 10 U.2d 417, 354 P. 2d 105 and the case of *Sine v. Holland,* 18 U.2d 222, 418 P.2d 979, both of which were mandamus cases to compel public officials and the county to bring condemnation proceedings whereby the owners of the property could be properly compensated for loss access and damages. The court very properly held that the state and its agency, the county, could not be compelled to bring condemnation proceedings against its desire the county and the state had not waived its immunity and could not be sued without consent and the cases were dismissed. The court holdings in each case that the state had used its police power reasonably. In these instances the principle that property cannot be taken without just compensation was pitted against the principle of the immunity of the government from suit and the court properly held the government was immune from suit in any case.

We point out that Judge Hansen cited the *Fairclough* case and also the case of the *Springville Banking Co. v. C. Taylor Burton,* 10 U.2d 100, 349 P.2d 157, which was also a mandamus case and is clearly distinguishable from the present case. This case clearly established that no abutting property owner has a compensable right in the flow of traffic. The plaintiffs are suing a private individual who has no immunity and one who doesn't have police power of the county as a protection for its acts and clearly is liable in damages to the plaintiffs for damage done for the loss of access.

The defendants also cite *Utah Road Commission v. Hansen,* 14 U.2d 305, 383 P.2d 917, which case even from their own citation shows the Hansens were entitled to compensation reasonable access. In the present case there is no access reasonable or otherwise. In the Hansen case the court held that the loss of access had already been computed in the damages when there was an allowance for severance which clearly amounts to payment for the loss of access.

The defendants state that the abutter is not entitled to access at all points of his property but in this particular instance he was abutting the road and could choose where he wanted to go on to it just as every other property holder along Creek Road chose the place where they wished to drive on to the road.

The defendants make much of the fact that there had not been a right-of-way established from plaintiffs land onto this road. Here the plaintiffs were letting the land lie idle until they wanted to build or sell to some one else to build. One acre with rather poor soil would not be profitable to farm. Under the defendants' argument, if a person had one half mile of property abutting the road with only one gate and sold the one hundred feet with the gate in, the rest of the property would be landlocked, as he hadn't established or reserved for himself a way out of his land, which of course is absurd in the extreme. Incidentally the fence dividing the property from the road was down and actual access could be made at most any point.

In considering this problem it should be kept in mind the type of road we are dealing with. This is not a restricted access road and there is absolutely no reason why any property owner cannot go onto the road at any point. The road in front of plaintiff's property was perfectly adequate for their needs and they were entitled to use it for their

The defendants also make much of the fact that access to the south on Rubidoux Road can be obtained by the payment to the Happy Valley Inc. of $1500. plus interest for a number of years. but this is a right that the plaintiffs have always had and in addition they always had the right to the road on the north end of the property, which has now been taken away from them making the north half of the property practically useless. It is submitted that defendants Soter's Inc. could use the land more judiciously in connection with the development of its subdivision.

## POINT II

Previously submitted by plaintiffs and as argued by the defendant is submitted without further argument.

## CONCLUSION

It is evident from the record and briefs that the dismissal was premature and the court should remand the

case for further proceedings with the requirement that the plaintiff be paid damages for what the loss proves to be and that each of the other defendants be required to prove their claim against the other defendants.

Respectfully submitted,

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