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Hazel 0. Sanford v. University of Utah : Brief of Respondent Hazel O. Sanford

IN THE SUPREME COURT OF THE STATE OF UTAH

HAZEL O. SANFORD,
Plaintiff and Respondent,

vs.

UNIVERSITY OF UTAH, an agency of the State of Utah,
Defendant and Appellant.

Case No. 12378

BRIEF OF RESPONDE... HAZEL O. SANFORD

Appeal From Judgment of the District C... of the Third Judicial District in and ... Salt Lake County, State of Utah, ... Honorable Bryant H. Croft, Judge

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INDEX

Page

AUTHORITIES CITED

Cases

Statutes

INDEX (Continued)

IN THE SUPREME COURT OF THE STATE OF UTAH

HAZEL O. SANFORD,
Plaintiff and Respondent,

vs.

UNIVERSITY OF UTAH, an agency of the State of Utah,
Defendant and Appellant.

Case No. 12176

BRIEF OF RESPONDENT HAZEL O. SANFORD

NATURE OF THE CASE

Respondent, the plaintiff below, brought an action for property damages sustained in a flood caused by the diversion of the natural flow of surface waters.

DISPOSITION IN THE LOWER COURT

A jury trial was held in the District Court of the Third Judicial District, in and for Salt Lake County, the Honorable Bryant H. Croft presiding. The jury returned a verdict in favor of Respondent and against Appellant for $13,687.00. The damages were assessed as follows: $5,350.00 for loss of personal property, $3,337.00 for

damage to real and personal property, and $5,000.00 for diminution in value of real property. The lower court judge denied Appellant's motion for a new trial conditioned upon Respondent's consenting to a remittitur of $500.00. Respondent consented to the remittitur, and judgment was entered for $13,187.00 plus costs. Appellant has appealed the entire judgment, and Respondent has cross appealed that part of the judgment which reduced the damages attributable to diminution in value of real property by $500.00.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this court reversing the trial court as to the $500.00 which Respondent was forced to remit from the jury verdict. In all other respects, Respondent requests that this court affirm the judgment of the trial court.

STATEMENT OF FACTS

Respondent, a widow 70 years of age, owns real property at 8 North Wolcott, in Salt Lake City, Utah. (R. 229) Directly to the east of this property sits the Merrill Engineering Building with its adjacent parking lot. (Ex. 16-D) All of the property to the east of Respondent's property is owned by Appellant and has been so owned at all times material herein. (R. 362-364; 458-459) A peripheral road lies on Appellant's property between Respondent's property line and the Merrill Engineering Building. (Ex. 16-D) The terrain in this area is steeply

contoured with the Merrill Engineering Building sitting on a hill above Respondent's property.

Prior to the construction of the Merrill Engineering Building, its site was used for a part of the Fort Douglas golf course. The natural drainage of this site, both before and during its use as a golf course, was to the north rather than towards Respondent's property. (R. 232) In the almost fifty years Respondent had occupied her home, there had been no flood problems. (R. 233)

Prior to 1963 the University of Utah added a substantial amount of fill, changed the natural contour and constructed upon this site the Merrill Engineering Building. (R. 234; 528) In 1963 a severe flood caused damage to Respondent's home and property. (R. 506-507; 236-237)

In 1967 a parking lot was constructed north of the Merrill Engineering Building and east of the peripheral road. (R. 528-529) The lot was built to provide parking space north of the Merrill Engineering Building for 800 automobiles. (R. 504) The work was designed by Carston & Hansen Landscape Architects, and was performed by the Gibbons & Reed Construction Company. (R. 513) The parking lot was contoured so that all water which might fall upon it would be channeled into two drains which were located directly east of Respondent's home. (R. 454-455) From these drains; which are connected, an 18" concrete pipe was installed to convey all water down to the peripheral road. (R. 454-455) Although the construction plans called for a 24" reinforced concrete pipe from the peripheral road to Federal Way (R. 368), the pipe ac-

tually installed (which was still there as of the trial of this matter) was a 21″ corrugated metal pipe. (R. 368) While the planned 24″ reinforced concrete pipe would have carried 19 cubic feet of water per second, the corrugated metal pipe would and will carry only 10.6 cubic feet per second. (R. 377) Respondent's engineer testified that the runoff area serviced by the drain required a 30″ reinforced concrete pipe or a 36″ corrugated metal pipe from the peripheral road to Federal Way. (R. 378) Appellant presented no testimony controverting either the size pipe required, the size pipe shown in the construction plans or the size pipe actually installed.

On July 16, 1967, after the lot had been graded and graveled, a rainstorm struck the area of the University campus. (R. 375) The drainage facilities were inadequate to handle the water flowing off the parking lot and hill, and Respondent's home was severely flooded. (R. 439-440) This flooding occurred despite University assurances to Respondent that the debacle of 1963 would not be repeated. (R. 245) Appellant's witness claimed that the rainstorm was "excessive" but that he had seen a storm of this size "twice in the three and a half years" he had been in Salt Lake City. (R. 584) Respondent's engineer testified that engineers normally design storm sewers so as to make them adequate for the size storm which appears, on the average, once every ten years. (R. 375)

The jury awarded Respondent damages. Appellant raises three objections to the jury verdict:

(1) That the University of Utah was an improper party defendant;

(2) That the jury should have been instructed on negligence;

(3) That the defense of sovereign immunity should have barred this action.

The first two of these objections reflect Appellant's failure to recognize the theory upon which Respondent recovered. The third point questions the lower court's interpretation of the Utah Governmental Immunity Act. Utah Code Annotated 63-30-1, et. seq. (Repl. Vol. 1967).

Respondent's cross appeal challenges the findings of the trial court that the evidence of diminution of value of Respondent's home, caused by the likelihood of future floods, did not support the jury's finding of $5,000.00 in damages.

ARGUMENT

POINT I

THE UNIVERSITY OF UTAH, AS THE OWNER OF THE REAL PROPERTY, IS RESPONSIBLE FOR DAMAGES RESULTING FROM DIVERSION OF THE NATURAL DRAINAGE FLOW OF SURFACE WATERS FROM ITS PROPERTY.

Appellant asserts that the acts, conduct, omissions or defective conditions complained of were created or caused by other state agencies or other persons not subject to its supervision or control. This claim ignores Appellant's liability as owner of the property and the statutory relationship between the Building Board and other state institutions. Appellant was the owner of the land upon

which was constructed the Merrill Engineering Building, its parking lot, the peripheral road and the planted area on both sides of the road. This property was deeded to Appellant from the Federal Government in 1948. (R. 459) The trial established that there was no transfer of an easement or right-of-way on the parking lot or the peripheral road. Despite these facts, Appellant appears to be arguing that it had nothing to do with the construction.

To support this argument, Appellant asserts that the statutory scheme establishing the Building Board envisions that the Building Board shall be separate and independent of the state agencies for whom it works. This argument is misleading and disingenuous, to say the least. Section 63-10-7 Utah Code Annotated (Repl. Vol. 1967) outlines, in part, powers and duties of the Building Board:

> "(1) To cause to be prepared in *conjunction with the institutions* a masterplan of structure built or contemplated, . . ."
>
> "(5) . . . to determine . . . the need for all alterations and repairs to all existing buildings of the state and of the departments, commissions, institutions and agencies of the state where the estimated cost is in excess of $8,000, and to exercise supervision over the design, construction and installation of heating plants and appurtenances thereto in all state buildings; *provided, that no building shall be constructed, improvements made or work done for, or on the property of, any state institution until the location, design, plans and specifications therefor shall be approved by the board, commission or officials charged with the administration of the affairs of such institution.*" (Emphasis added.)

Appellant rightly claims that the Building Board has the responsibility to prepare plans and supervise construction. Appellant incorrectly implies that the statutory scheme gives the local institutions, such as Appellant, no control over the plans that are adopted. Both for the adoption of the "master plan" and for all major construction work done for or on its property, Appellant must approve or disapprove of the plans prepared and submitted. In fact, the Building Board cannot act without such approval or disapproval. Whether Appellant exercised its statutory responsibility is irrelevant. The statute imposes upon Appellant control over the alteration of the natural drainage which caused a flood and created the present flood danger.

POINT II

THE CAUSE OF ACTION UPON WHICH RESPONDENT RECOVERED DID NOT REQUIRE A SHOWING OF NEGLIGENCE AND SO NO PREJUDICIAL ERROR WAS COMMITTED IN THE LOWER COURT'S REFUSAL TO INSTRUCT ON NEGLIGENCE.

Respondent recovered because Appellant, as the owner of higher land, was responsible for damage resulting from changes made in the natural flow of surface waters. This cause of action is universally recognized throughout the United States with minor variations in theory and formulation. It is uniformly held that an upper landowner ordinarily has no right to artificially collect surface waters and discharge them in a mass upon the lower proprietor to the latter's damage. See Annotation, 59 ALR 2d 424 at 442.

The earliest Utah pronouncement on the point was in *North Point Consolidated Irrigation Co. v. Utah and Salt Lake Canal Co.,* 16 Utah 246, 52 Pac. 168 (1898):

> "Undoubtedly a proprietor of higher land is entitled to the benefits of the natural flow therefrom, onto the lands of another, of surface or other waters not brought there by artificial means. *But, when water is brought onto the higher land by artificial means, the proprietor is not entitled to such natural flow onto the land of another, to his injury.* The proprietors of higher lands have not the right to the natural flow of waters brought on to their lands by an artificial means." (*Supra,* at 173) (Emphasis added.)

In *Andrew Jergens Co. v. City of Los Angeles,* 229 P.2d 475 (Cal. App. 1951), the California court stated:

> "Every landowner must bear the burden of receiving upon his land the surface water naturally falling upon land above it and naturally flowing to it therefrom, and he has the corresponding right to have the surface water naturally falling upon his land or naturally coming upon it, flow freely therefrom upon the lower land adjoining, as it would flow under natural conditions. From these rights and burdens, *the principal follows that he has a lawful right to complain of others, who, by interfering with natural conditions, cause such surface water to be discharged in greater quantity or in a different manner upon his land, than would occur under natural conditions.* This is the settled law of this state." (*Supra,* at 477) (Emphasis added.)

In *Maricopa County Municipal Water Conservation District No. 1 v. Warford,* 206 P.2d 1168 (Ariz. 1949) the Arizona Supreme Court reaffirmed its earlier position that:

> "A land owner has no right to collect surface water in an artificial channel and discharge it in large quantities upon the land of a lower owner to his damage, . . . " Citing *Roosevelt Irrigation District v. Beardsley Land and Investment Company,* 282 Pac. 937 (Ariz. 1929); *Maricopa County Municipal Water Conservation District No. 1 v. Roosevelt Irrigation District,* 6 P.2d 898 (Ariz. 1932). (*Supra,* at 1174)

2 Thompson, On Real Property, Perm. ed., §662 formulates the rule thusly:

> "The right of the upper landowner to discharge water on the lower lands of his neighbor is in general a right of flowage only in the natural ways and natural quantities. If he alters the natural condition so as to change the course of the water, or concentrate it at a particular point, or by artificial means to increase its volume, he becomes liable *for any injury caused thereby."* (Emphasis added.) (Footnotes omitted.)

These authorities affirm the rule that a plaintiff has the right to be free from the artificial diversion of surface waters onto his property whether through accident, negligence or intent.

This rule is Utah law. *Reeder v. Brigham City,* 17 Utah 2d 398, 413 P.2d 300 (1966). In *Reeder*, the city diverted surface and percolating waters through man-made storm and drainage systems. The waters were then dumped into the plaintiff's private irrigation system. Upon appeal from a judgment granting an injunction against Brigham City, the Supreme Court held that the evidence supported findings that the city had altered the natural

drainage and that the resulting diversion caused the excess waters to enter the plaintiff's land and irrigation ditches. The court held:

> "Appellants, having interfered with the natural flow of the water, and by such interference having caused the waters to be discharged in greater quantities and carried in a different manner than occurred under natural conditions, the court correctly granted the injunction. *Respondent has the right to be free from receiving waters on his land to his damage which do not find their way in their natural course and its natural conditions." (Supra,* at 302) (Citations omitted.) (Emphasis added.)

Instructions 13 and 14 (R. 147; 148) were in conformity with the holding of the *Reeder* case and were proper.

Point II of Appellant's brief asserts that if a finding of negligence is not required, Appellant will be put in a worse position than would be a private individual sued under the same circumstances. Nothing could be further from the truth. The jury found that Appellant diverted the water from its natural drainage channel without providing an adequate drainage system. (Instruction 16, R. 150) Had such facts been found against any private litigant, the result would have been the same.

To buttress its argument to the effect that a higher burden will be placed upon governmental entities than upon a private defendant, Appellant cites eight cases. None of these cases have anything to do with the diversion of the flow of surface waters. They are negligence cases where the normal rules of negligence law apply.

With these cases Respondent has no quarrel. Respondent only wonders why they were cited.

POINT III

SECTION 10 OF THE UTAH GOVERNMENTAL IMMUNITY ACT DOES NOT LIMIT OR MODIFY SECTIONS 8 AND 9.

Throughout the trial of this matter and in its brief on appeal, Appellant claimed that it was immune from suit. The trial judge ruled that the construction and maintenance of a parking lot, a peripheral road and a drainage system were done by Appellant in its governmental capacity and that Appellant would therefore be immune from suit for damage caused by the construction and maintenance of these improvements unless immunity was waived by the Utah Governmental Immunity Act (the Act). Utah Code Annotated 63-30-1, et. seq., (1967 Repl. Vol.) (See R. 486, et. seq.) The trial court instructed the jury that Appellant's immunity from suit had been waived under Section 9 of the Act if a defective or dangerous condition, which was not latent, of a public improvement caused damage to Respondent. (Instruction 14, R. 147). Section 9 provides:

> "Immunity from suit of all governmental entities is waived for any injury caused from a dangerous or defective condition of any public building, structure, dam, reservoir or other public improvement. Immunity is not waived for latent defective conditions."

Despite the clear meaning of the foregoing section, Appellant argues that Respondent cannot sue unless Appellant's immunity from suit is waived under Section 10

of the Act. Having made this assumption, Appellant argues that specific exceptions to waiver contained in Section 10 prohibit this action. This argument involves a unique application of the rules of statutory construction and a total disregard of the plain meaning of the statute.

After a Title and Definitions section and a general statement providing for governmental immunity except where waived in the Act, the Act provides that any waiver contained therein shall not be construed as an admission or denial of liability but that, where immunity is waived, liability will be determined as if the entity were a private person. The next six sections provide for a waiver of immunity from suit for contractual obligations (Sec. 5), for actions involving real or personal property (Sec. 6), for actions involving the negligent operation of motor vehicles (Sec. 7), for actions involving the condition of public improvements (Secs. 8 and 9) and for actions involving the negligent acts or omissions of employees (Sec. 10). Despite the fact that none of these sections refer to one or more of the remaining sections, Appellant argues that immunity is waived under Sections 8 and 9 only where the conduct creating the condition was negligent and where immunity would be waived for such negligent conduct under Section 10. Appellant seems to say that exceptions modifying Section 10 must be read to modify all the provisions waiving immunity. Had the legislature so intended, it would have so written these exceptions into Sections 5 through 9.

A noted authority on governmental immunity, Professor Arvo Van Alstyne, has made the following com-

ment about the broad waiver of immunity from suit contained in Section 10 and its relationship to Sections 8 and 9:

> "The broad waiver, however, is also accompanied by a series of specific exceptions — that is, a series of specified instances in which the general waiver of negligence immunity will *not* be applicable and the public entity (unless liable under some *other* statutory waiver of immunity) will be immune from liability. The legislative purpose in spelling out independently the specific waivers for negligent operation of motor vehicles and other equipment, and for dangerous and defective conditions of public property, thus emerges plainly: these *specific* waivers (in U.C.A. 63-30-7, 63-30-8 and 63-30-9) are *not* subject to the exceptions enumerated in the *general* waiver section (U.C.A. 63-30-10) but are to be applied independently from the latter section. This is an exceedingly important concept which is crucial to the proper understanding of the list of exceptions in section 63-30-10 and the types of cases to which those exceptions apply. Had the Legislature intended the listed exceptions to apply to motor vehicles or dangerous condition cases, there would have been no need to provide separately for these grounds of liability, for the general waiver of negligence immunity would have been enough. Thus, it follows that the exceptions in section 10 do *not* so apply." Van Alstyne, *Governmental Torts in Utah, Part Two,* The Summation, Winter 1968, at page 7. (R. 66)

Appellant may still argue that Section 10 modifies Sections 8 and 9 in those cases where a showing of negligence is a prerequisite to plaintiff's recovery. If so, Appellant's argument can be summarily disposed of at this time. Although Respondent alleged negligence as an al-

ternative cause of action, no instructions were given on negligence, the issue of negligence was never before the jury and Respondent does not here rely upon a negligence theory.

Appellant has found some comfort in a statement, found in the case of *Velasquez v. Union Pacific Railroad Co.,* 24 Utah 2d 217, 469 P.2d 5 (1970), which may imply that the discretionary function exception in subparagraph (4) of Section 10 should apply to all actions brought under Sections 8 and 9. In *Velasquez,* a passenger sued the Utah Public Service Commission and the defendant railroad alleging negligence on the part of the Public Service Commission in failing to require proper and adequate safety devices at a railroad crossing. Following a nonsuit in the trial court, the plaintiff appealed claiming that the Public Service Commission was *negligent* in that it (1) did not require the railroad company to install adequate protective devices and (2) did not systematically discover dilapidated signs. The Utah Supreme Court held that the behavior involved was discretionary and so the act did not waive the Public Service Commission's immunity from suit.

In no way could a railroad safety device installed and maintained by the railroad be construed as a dangerous and defective condition of a public improvement but is instead an improvement owned and operated by the railroad. Accordingly, any allegation that immunity should be waived by Sections 8 and 9 was clearly improper. The only section available to the plaintiff in the *Velasquez* case to establish a waiver of immunity from suit was Section

10. The court quite properly treated the case as one brought under Section 10 for negligence and then upheld the trial court because any negligent conduct which might have been found on the part of the Public Service Commission was in the exercise of a discretionary function.

To the extent that the *Velasquez* case might be interpreted as holding that where *negligence* is required in a cause of action alleged under Sections 8 and 9 it is subject to the exceptions contained in Section 10, Respondent believes the *Velasquez* case to be in error. However, even a holding to this effect is not fatal to Respondent's case because negligence is not required for a cause of action alleging diversion of the flow of surface waters (see *Supra,* pp. 7-11). The plaintiff in *Velasquez* attempted to recover on a theory of negligence. Thus, even such an extreme interpretation of the *Velasquez* case has no bearing on the instant case.

Appellant's argument that damages should not be granted in this case because damages were not granted against Brigham City in *Reeder, supra,* must also fail. This court held in *Reeder* that the city acted in a governmental capacity. The conduct complained of occurred in 1962 and the Utah Governmental Immunity Act was not passed until three years later. For this reason the city was immune from suit and damages could not be granted against it. This fact has now been changed with the passage of the Act.

Contrary to Appellant's argument, the *Reeder* case does not characterize diversion of surface waters as a

nuisance. Even if it did, such a characterization would not preclude recovery. The Act bases its waivers of immunity from suit upon contractual obligations, title to property, acts of employees or agents, conditions of public improvements and limited cases of negligence. For the most part these areas of waiver do not involve legally cognizable causes of action. Section 4 provides:

> "Nothing contained in this act, unless specifically provided, is to be construed as an admission or denial of liability or responsibility in so far as governmental entities are concerned. Wherein immunity from suit is waived by this act, consent to be sued is granted and liability of the entity shall be determined as if the entity were a private person."

Thus, even though the Act waives immunity from suit, the plaintiff must allege and prove a legally cognizable cause of action. In certain sections, such as 8 and 9, there is no correlation between the areas where the Act waives immunity and the cause of action. Since Section 4 says that liability will be determined as though the governmental entity is a private person, a plaintiff who can allege and prove a nuisance, or any other cause of action, is allowed recovery against a governmental agency where there has been a waiver under any of Sections 5 through 10.

Appellant argues that because its activities in designing and locating the parking lot were discretionary, there is no waiver of immunity. This is a remarkably skillful job of setting up a straw man. As pointed out, *Supra* pp. 11-15, Section 10 of the Act has no bearing on this case,

and thus Appellant's arguments about discretion are irrelevant.

Although not required for Respondent's case, Sections 8 and 9 might also be interpreted to create new causes of action. Thus, it is arguable that whenever there is a defective or dangerous condition in the enumerated public structures for which immunity is waived, the claimant has a cause of action. If this is the proper interpretation of these two sections, then the discretionary function exception of Section 10 does not apply. On both readings of Sections 8 and 9, it is impossible to see how the defense of sovereign immunity would be available to the Appellant in the present case.

POINT IV

APPELLANT IS PROHIBITED FROM RAISING THE DEFENSE OF GOVERNMENTAL IMMUNITY BY VIRTUE OF ITS PURCHASE OF INSURANCE COVERING THIS RISK.

Although the trial court ruled to the contrary (R. 79-80), Appellant is precluded from raising the defense of governmental immunity because it has purchased liability insurance to insure it against the risk involved in this case. Section 63-30-28 Utah Code Annotated (Repl. Vol. 1967) provides that any governmental entity may purchase insurance against any risk which may arise as the result of the application of the Act. Section 29 of the Utah Act requires certain provisions in all insurance so purchased. Subsection (a) of that section provides:

> "In respect to bodily injury liability that the insurance carrier shall pay on behalf of the insured governmental entity all sums *which the insured would in the absence of the defense of governmental immunity be legally obligated to pay as damages because of bodily injury, ...* "
> (Emphasis added.)

Subsection (b) requires:

> "In respect to property damage liability that the insurance carrier shall pay on behalf of the insured governmental entity all sums *which the insured would in the absence of the defense of governmental immunity be legally obligated to pay as damages because of injury to or destruction of property, ...* " (Emphasis added.)

The foregoing policy provisions require the insurance carrier to agree to pay all claims which the governmental entity must pay absent any defense of governmental immunity. In short, the insurance company must take the same risks it would take if it were insuring a private entity such as Kennecott Copper Corporation. However, reliance need not be based upon these subsections alone.

Section 30 of the Act provides that:

> "Every contract or policy of insurance purchased under the terms of this act for any or all risks created by this act *shall include a provision or endorsement by which the insurer agrees not to assert the defense of sovereign immunity,* and to pay all sums for which it would otherwise be liable under its contract or policy of insurance." (Emphasis added.)

The proposition that the Act prohibits an insurance company defending a suit against any governmental en-

tity from asserting the defense of sovereign immunity is amply supported by the authorities. *Van Alstyne, Governmental Tort Liability: A Decade of Change, 1966,* University of Illinois Law Forum, 919, 967; Note, *The Utah Governmental Immunity Act: An Analysis,* 1967, Utah Law Rev. 121, 147; *Van Alstyne, Governmental Tort in Utah, Part Two, The Summation,* Winter 1968, page 7 at page 8 (R. 66). Should insurance purchased by a governmental entity not contain the waiver provision, Section 31 provides that the policy will nevertheless be construed as though it contained the required provision.

Governmental agencies (under the Act) purchase liability insurance to protect themselves against financial loss and to *protect the public* injured by acts of the governmental entity. Insurance companies should not be allowed to subvert the policy of the Act. This court, in the case of *Cobia v. Roy City,* 12 Utah 2d 375, 366 P.2d 986 (1961), decided prior to the Act, reached the heart of the problem when it stated:

> "The city did have a liability policy, purporting to cover the loss, but still asserted the defense of sovereign immunity, *which apparently was a waste of the taxpayers' money." (Supra,* at 989) (Emphasis added.)

By enacting Section 30 of the Act, the legislature indicated its agreement with the court's analysis in *Cobia* that the purchase of insurance when the insurer can raise the defense of governmental immunity would waste the taxpayers' money.

Appellant will undoubtedly assert that the purchase of liability insurance is only to cover risks created by the

Act, i.e., risks where immunity is waived. However, if this is the case, then Section 29 (a) and (b) and Section 30, *Supra,* are entirely superfluous and useless. The defense of immunity cannot be raised as to risks created by waiver of immunity under the Act. This was the whole purpose of the Act. If the insurance company is only insuring against the risks created by waiver of immunity, there would be no defense of sovereign immunity left it to waive under Section 30. It would be absurd to construe the statute in such a manner. When the legislature required the insurance companies to waive a defense, it obviously intended that there be something to waive. Therefore, it must have been intended that the purchase of liability insurance creates a waiver of all immunity defenses for the risks insured against. Clarifying its intention, the legislature added that the insurer must agree " . . . to pay all sums for which it would otherwise be liable (if it had not insured a governmental entity) under its contract or policy of insurance."

Those entities not purchasing insurance are still subject only to the specific waiver of immunity set out in the statute. Thus, an insurance company, by a waiver of the defense of sovereign immunity, would be waiving something worthwhile. Since it is covered by insurance, the governmental entity would be giving up nothing. Thus, the policies of the Act — entity protection and protection of the injured party — are completely fulfilled. In addition, the entire statute is given effect.

The authorities previously cited agree with this construction of the Act. In addition, there is case law support-

ing the interpretation advocated here. In *Marshall v. City of Green Bay,* 118 N.W.2d 715 (Wisc. 1963), the city was sued for damages for its alleged negligence in the operation of a toboggan hill run located outside of the city corporate limits. The city had purchased an insurance policy containing a provision wherein the insurer agreed not to raise the defense of governmental immunity. Hence, the issue was whether, by such a contract with the insurance company, the city would waive its tort immunity. In deciding this question, the court stated:

> "The immunity granted municipalities from tort liability was created by case law basically and primarily to protect public funds and property. Such immunity can be waived by the municipality when it has secured that purpose by insurance and believes a waiver to be advantageous or desirable." *Supra,* at 717.

Thus, the court concluded that even without a statute purporting to do what the Utah statute does, a muncipality could provide by contract for a waiver of the immunity defense. The court further stated:

> "We construe this agreement to be a waiver of governmental immunity by the city recognized and agreed to by the insurer. . . . *Under such circumstances to allow the city to insist on its immunity by a defense controlled by the insurer would be a virtual fraud and the misuse of public funds."* *Supra,* at 718.

This case is in accord with a growing list of jurisdictions taking this view. See cases cited at page 718 of the *Marshall* opinion. In the case of *Geislinger v. Village of Watkins,* 130 N.W. 2d 62 (Minn. 1964), the court construed

a specific statute providing for waiver of immunity defenses to mean that the insurer could not assert these defenses at all.

In *Thomas v. Broadlands Community Consolidated School District No. 201,* 109 N.E.2d 636 (Ill. App. 1952), an action was brought for personal injury occurring on a playground owned by a school district. The school district carried liability insurance even though it was not authorized to carry such insurance under the law, and the court held the purchase of such insurance to be a waiver of the immunity defense.

In *Cobia,* the Utah Supreme Court held that the operation of a sewer was not a proprietary function and, therefore, could not be actionable absent a legislative waiver of immunity. At that time, prior to the enactment of the Governmental Immunity Act, this court held that the purchase of liability insurance did not constitute a waiver of immunity. By the passage of the Governmental Immunity Act, the Utah legislature prohibited the misuse of public funds condemned in *Cobia.* This it did in explicit terms. See *Van Alstyne, Governmental Torts in Utah, Part Two, The Summation,* Winter 1968, at 9. (R. 68) There would be grave injustice in allowing an insurance company to take Utah tax dollars as insurance premiums and then to avoid liability to an injured Utah taxpayer on the grounds that the State could not be held liable for the risk the State had insured against.

POINT V

THE TRIAL COURT ERRED IN REDUCING THE AMOUNT OF DAMAGES AWARDED TO PLAINTIFF.

The jury returned a verdict of $13,687 for plaintiff. (R. 195) Of this amount $5,000 was for diminution in value of real property due to the continuing threat of future floods. On the 11th day of June, 1970, an order was entered by the trial court judge. Paragraph 1 of the order stated:

> "Defendant's motion for a new trial is denied and as a condition to denial of said motion it is ordered that the sum of $500 be deducted from the judgment on the jury verdict and the sum of $500 is hereby deducted from the judgment on the jury verdict, as being excessive and not supported by the evidence regarding diminution of value." (R. 202)

The lower court judge felt that the plaintiff's evidence was insufficient to sustain the $5,000 damage award. A careful reading of the record shows that the evidence was in fact sufficient. Plaintiff presented the testimony of Werner Kiepe, an appraiser. (R. 398, et. seq.) Mr. Kiepe first determined the value of Respondent's home prior to the construction of the parking lot. (R. 411) Mr. Kiepe then assumed that a flood threat was created by the construction of the public improvement — which fact was later found by the jury — (R. 412) and stated that he arrived at a new value:

> "A The well informed buyer should certainly know, or perhaps even be told by a seller that this

house had been exposed to two floods. To him this would mean that he probably wouldn't even consider the house because of the fact that it had been the victim of two floods. However, that would eliminate a part of market. However, there are certain people who would do two things: First of all they would try to correct, as far as they could, the problem, and secondly, they would drive a sharper bargain; they would figure they were in the driver's seat, that the seller was not in a favorable position, and so *taking those two factors into consideration I arrived at a value after the flood.*" (R. 411-412)

Mr. Kiepe then stated that the diminution due to the buyer's advantageous bargaining position was $4,500. (R. 412) and that corrective measures costing $1,000 would also be deducted from the price a buyer would pay. (R. 413) So as to leave no doubt, Mr. Kiepe summarized his findings on direct examination as follows:

"Q Now, what do you get when you add the total of the discount and the cost of the cure in your opinion?

A $5500.00.

Q And what does this $5500.00 represent?

A It represents the difference between the before and after value.

Q Now, this $5500.00 that is the difference between the before and after value, does that — if that were awarded to Mrs. Sanford would that compensate her for repairs to her personal property, repairs to the structure and things such as this?

A No." (R. 413)

The jury's finding of $5,000 was $500 less than the limits of the foregoing testimony. The order of the trial court judge was in error and should be reversed. This court should order that the original jury verdict of $13,687 should be the judgment in the case.

CONCLUSION

Respondent respectfully submits that the judgment of the lower court should be affirmed in all respects except for the reduction of $500.00 in damages awarded for diminution in value of Respondent's home. With respect to the said $500.00, this court should order that the $500.00 remittitur be restored and that judgment should be entered in favor of plaintiff for the amount of $13,687.00.

Respectfully submitted,

MULLINER, PRINCE &
MANGUM

Frederick S. Prince, Jr.
Kenneth W. Yeates