1972

Automotive Products Corporation v. Provo City Corporation : Brief of Appellant

IN THE SUPREME COURT OF THE
STATE OF UTAH

AUTOMOTIVE PRODUCTS
CORPORATION,
Plaintiff and Respondent,

vs.

PROVO CITY CORPORATION
Defendant and Appellant.

Case No. 12[illegible]

BRIEF OF APPELLANT

Appeal from a Judgment of the
Fourth District Court
The Honorable George E. Ba[illegible]

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IN THE SUPREME COURT OF THE
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AUTOMOTIVE PRODUCTS
CORPORATION,
Plaintiff and Respondent,
vs.
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Defendant and Appellant.

Case No. 12790

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an action in equity, in which the owner of real property brought suit against the City for compensation for the taking of private property to widen a City Street.

DISPOSITION IN THE LOWER COURT

The Court sitting without a jury determined that there had been a taking by Provo City of a strip of property belonging to the Plaintiff-Respondent, and awarded damages in the nature of compensation for the taking of property under the power of Eminent Domain.

After judgment was granted, Appellant

filed a motion for the taking of evidence on the issue of whether or not the Court should have granted an off-set for claimed special benefits conferred on the property by the taking, the Court determined that such an off-set would be applicable only if there had been severance damage granted and not against the amount decreed by the Court as compensation for the taking.

NATURE OF RELIEF SOUGHT

The Appellant seeks reversal of that portion of the Judgment finding that there was a taking of the Respondent's property by the Appellant, Appellant claiming that specific actions of the Respondent constituted a dedication of the strip in question for street purposes to the public.

Appellant also seeks reversal of the portion of the decision which disallowed off-set benefits conferred on the Respondent's property, because no severance damages were awarded.

STATEMENT OF FACTS

Plaintiff-Respondent is the owner of three adjacent parcels of property on the South side of 1230 North Street, the first parcel being utilized as a service station lot at the intersection of 1230 North Street and University Avenue, the second and third parcels being located immedi-

ately adjacent and to the east, the middle parcel being utilized for two businesses, one, a donut shop and the other a laundry and dry cleaning center. The eastern-most parcel being the most recently built on, accommodates at the present time a retail business selling Mexican food.

The property in question was acquired by the Respondent in 1946 at which time the property was occupied by older style residences which the Respondent eventually removed and replaced with business buildings.

In 1955 the City commenced a comprehensive widening project of 1230 North Street in conformity with the Master Street Plan of the City (Trial transcript, page 40 and 18,) and after that year all new buildings in the area were required to set back to make provision for a street having a width of 100 feet (Trial transcript page 37, 38 and 72).

In 1959, the Respondent applied for a building permit and pursuant to the permit which was issued, erected a commercial building on the middle parcel of property owned by it and in doing so set back to adhere to the requirements of the City for street widening (Trial transcript page 69). Prior to that time, the City (or County) had black-topped approximately thirty feet

of street width leaving a strip approximately twenty-eight feet in width between the South edge of the black top and the proposed street line in a graveled, but otherwise unimproved condition. (See Trial transcript page 32). This area was used by the public for parking of cars and for vehicle travel.

The south thirteen feet of the twenty-eight foot strip is the subject of this suit. Prior to August 17, 1967, the thirteen foot strip was also occupied by a line of utility poles (Trial transcript, page 79 and 97).

In October, 1962, Respondent leased the property on the corner of University Avenue and 1230 North Street to Standard Oil Company (Trial transcript page 76, 80, and 81).

Frank Earl, President of the Respondent Corporation, together with the Oil Company presented a plan for a service station to the City, which was required to be modified to adhere to set back requirements before a building permit was issued. The developers of the station installed at their own expense, curb, gutter, and hard surfacing, in line with the adjoining street improvements, all of which adhere to the planned 100 feet street width.

On August 17, 1967, the City, pursuant to a

notice of the intent to install special improvements, installed curb and gutter in front of the other parcels of ground owned by the Plaintiff, in line with and conforming to the curb lines established by the service station operator on the western most parcel. The City also installed strip paving approximately twenty-eight feet in width joining the existing paving in the center of the street and abutting the new curb and gutter installed in the same improvement district.

They did not install a sidewalk because the tenants of the Respondent had a metal fence installed parallel to the street right-of-way, approximately twelve feet South of the Respondent's property line in such a way that one additional foot of property would be required in order to install a full width sidewalk, the City Engineer and one of the members of the City Commission contacted the property owner requesting sale by the property owner of an additional one foot (including the property where the fence was located) to accommodate a standard width sidewalk. (See Trial transcript page 98). Respondent was subsequently assessed the cost of installing all the improvements, except the sidewalk which Respondent has subsequently installed at

its expense. (Trial transcript page 102.)

The Court sitting without a jury found that the Respondent was the owner of the North thirteen feet of the property and found that there was a taking which occurred on or about the 1st day of January, 1969, and that no compensation was paid for the taking and assessed damages for the thirteen foot strip as follows:

1. The Westerly 130 feet by 13 feet (in front of the service station) at $4.50 per square foot.

2. The Easterly 141 feet by 13 feet at $3.50 per square feet.

The judgment including interest from and after January 1, 1969, (see Memorandum Decision-designation of record on appeal No. 5).

ARGUMENT

Point I

MAY A CITY AS A CONDITION PRECEDENT TO THE GRANTING OF A BUILDING PERMIT, REQUIRE A PROPERTY OWNER TO SET BACK A DISTANCE BEHIND HIS PROPERTY LINE TO WIDEN THE ABUTTING STREET TO CONFORM WITH THE STREET WIDTH SHOWN ON THE CITY'S MASTER PLAN OF STREETS?

A City in the State of Utah has not only a duty but the prerequisite authority to widen

streets pursuant to an adopted Major Street Plan. Authorization for the City to have such a plan and the effect that it has upon property is set forth in Section 10-9-23, Utah Code Annotated, 1953 as amended. That Section says in part:

> ". . . the legislative body may make, from time to time, other additions to or modification of the Official Map by placing thereon the lines of proposed new streets or street extensions, widenings, narrowings or vacations which have been accurately surveyed and definitely located; . . . the placing of any street or street lines upon the Official Map shall not in and of itself constitute or be deemed to constitute the opening or establishment of any street or the taking or acceptance of any land for street purposes . . . "

Early approval of an Official Map act which prohibited the issuance of permits in the beds of mapped streets and upheld the power and even the obligation of the Municipality to reserve streets rights-of-way was succinctly stated in the case of *Headly vs. Rochester,* 272 New York 197, 5 Northeast 2 (d) 198 (1936) quoted in the American Law of Zoning, Anderson, Section 20.03 at page 516,517.

The Court in the *Headly* case viewed the

official street plan as a compromise between permitting of uncontrolled development on one hand and requiring the City to acquire the land through purchase or condemnation on the other.

The first was considered ineffective, the second was regarded as impractical, the compromise served the integrity of the street plan while it left the land owner free to sell, use and develop his land subject to reasonable limitations.

Thirty years after *Headly,* the principles announced in that case were seriously reviewed in context of a case involving the official map of the same city. The official map of the City of Rochester was challenged by a property owner who argued that a 14 foot set-back which was required to avoid construction in the bed of a mapped street amounted to a taking, inasmuch as he would be required to replan a projected building and incur extra expense; the Map where it encroached upon the Plaintiff's land was intended to provide land for street widening. The Court upheld the Map and denied relief. It found that the six percent extra cost demonstrated by the landowner was trivial when compared to the injury to the public welfare which would result if the City were prevented from planning for the future needs of the community. *(Roches-*

ter Business Institute, Inc. vs. Rochester, 25 App. Div. 2 (d) 97, 267 NYS 2 (d) 274 (1966) see other cases quoted in the American Law of Zoning, Section 20.03, page 518).

A number of other courts from various jurisdictions have upheld street widening projects even though they inhibited the manner in which property could be developed *(Miami vs. Romer,* 73 So. 2 (d) 285, (1964 Florida) *Hamer vs. State Highway Commission* 304 SW. 2 (d) 869, 1957 Missouri). A Wisconsin Court detected no taking for a public use where a property owner was denied a permit to build in a mapped street *(Miller vs. Manders,* 2 Wisconsin 2 (d) 365, 86 NW 2 (d) 469 (1957), see also *Hilltop Properties, Inc. vs. State,* 233 Cal. App. 2 (d) 349, 43 Cal. Rptr. 605 (1965).

The Utah Code provision found in 10-9-24 permits the Legislative body of the City to deny permits for any building or structure or part thereof on any land, located between the mapped lines of the streets shown on an Official Map and is quoted in the American Law of Zoning, Section 20.14, page 536 as a representative provision to aid in an orderly development of property within a municipality and at the same time safeguard the rights of the property owner. In

the *Headly vs. Rochester* case it was urged that the Official Map was confiscatory in that a landowner could not obtain a permit to build on a portion of his land which lay within the bed of a mapped street, the court upheld the restriction saying:

> "the mere adopton of a general plan or map showing streets and parks to be layed out or widened in the future without acquisition by the City of title . . . can be of little benefit to the public if the development of the land abutting upon and in the bed of the proposed streets proceeds in a haphazard way, without taking into account the general plan adopted . . . such restrictions (mapping and permits) are calculated to promote at least the public convenience . . . and to benefit the district in which the land is situated, as well as the City itself . . ."

The Court further indicated that to require the immediate exercise of the power of Eminent Domain would hamper the municipalities in planning for future development of the community.

It is incumbent on the landowner to show some loss to himself other than the actual property involved in the street widening project in

order to qualify himself for compensation under this theory. In the case now before the Court the widening project made feasible, development of the property for commercial purposes and there was no showing by the property owner that the widening of the street had done anything except improve his property for those commercial purposes. His actions in complying with the street widening project were similar to those of a subdivider, who in order to qualify himself under State Law and City Ordinances is required to set aside public streets as a part of his subdivision plat (See 57-5-4, UCA, 1953 as amended). Our State Law makes it a misdemeanor for a subdivider to sell any property within an anticipated subdivision before the recordation of the plat (see 57-5-5, UCA, 1953 as amended).

The Trial Court erred as to the law in assuming that the action of the City in requiring a property owner to set back as a prerequisite to the issuing of a building permit was "coercion" on the part of the City (see Trial Transcript, page 145). Under that theory anyone who had been "forced" to give a street within a subdivision under 57-5-5, UCA, ought to be entitled to bring a "reverse condemnation" suit, as in this instance, against the City in equity, and claim com-

pensation for any land so "appropriated" to the use of the public. It is immediately manifest that this type of legal theory would quickly bankrupt every municipality, county, and state in the Nation and unjustly enrich the subdivider and property owner, whom as a matter of fact is the prime beneficiary and user of the public streets.

POINT II

DOES THE INSTALLATION OF CURB AND GUTTER BY A PROPERTY OWNER AMOUNT TO A DEDICATION OF PROPERTY FOR STREET WIDENING PURPOSES?

The evidence before the Court in this case indicates that the Respondent, as it piece by piece, developed its property, acquiesced to a planned street widening and built upon each of the three lots owned by Respondent in conformity with the pre-determined street line, which in fact occupied the North twelve feet of the Respondent's property across the entire length of their ownership.

In front of the western most property Respondent, in cooperation with Standard Oil of California, its lessee, installed at the expense of lessee, curb and gutter and in the process set the curb and gutter back to conform to the require-

ments of the City for a wider street than was actually owned by the City. It is the contention of the Appellant herein, that this act, done in 1962, pursuant to a plot plan presented to the City, in connection with the establishment of a service station on the corner of University Avenue and 1230 North, was an act of dedication and would be so understood and interpreted both by the public and the City. (see Trial Transcript pages 76, 80 and 81.)

The Lease between the Respondent and Standard Oil Company (Exhibit 14) in which the Respondent was the Lessor and Standard Oil was the Lessee, contains the following provision:

> "Lessor reserves the right to convey the North 12 feet of the leased premises first above particularly described for the purpose of widening 12th North Street."

Respondent claims now that there was no intent to dedicate, but it is the position of the Appellant that the acts of the Respondent, in fact, indicate an intent to dedicate as well as an actual dedication and use by the public, of the property.

The precise question has been before the Supreme Court of the State of Utah many times, for instance in the case of *Mossis vs. Blunt,* 49

Utah 243, 161 P. 1127 at page 1130, the principle is expounded as follows:

> "A dedication rests primarily in the intent of the owner. There must be a concession intentionally made by him, which may be proven by declarations or by acts, or may be inferred from circumstances. No form or ceremony is necessary. It must, however, appear that he knew of the use by the public, and intended to grant the right-of-way to the public. No formal acceptance by any public officer or agent is necessary, but there must be an actual use by the public."

The *Morris vs. Blunt* case cites a number of other Utah cases wherein the same principle is expressed.

The case of *Hall vs. North Ogden City,* 175 P 2 (d) 703, at page 711, the Court further states:

> "Before a dedication of a street to the public use can be effected, there must be either an intention to so dedicate such lands on the part of the owner thereof or he must act in such a manner as to be estopped from denying such intention. Such intention may be shown by either oral or written declarations or it may

> be inferred from the surrounding facts and circumstances of the case, but in all cases such intention must be clearly manifest. (see cases quoted therein.)

In the testimony of Mr. Frank Earl, Plaintiff's President, he points out in several places that a portion of the street in question was actually occupied by a series of utility poles and though he denies an intent to dedicate, his acts speak louder than his words. A reasonable interpretation of the lease provision above-quoted, would also indicate an intent to dedicate to the public, consistent with the installation of expensive curb and gutter. The existence of this type of an improvement when made by the owner can only be interpreted by the public as an intent to establish a new street line regardless of technical ownership boundaries.

As in all cases the law must go by the acts of the person in question rather than by his interpretation of his intention given years after the act.

The question of intent to dedicate is exhaustively discussed in McQuillin's "Municipal Corporations", Third Revised Edition, Vol. 11, Section 33.30, beginning at Page 702 and indicates a number of ways in which the intent to

dedicate can be shown, they are enumerated as follows:

> "First, the intent may be shown by a written instrument, executed especially for the purpose of dedicating land to the public, for instance, where a plat is executed and recorded as provided for by statute so as to constitute a statutory dedication.
>
> Second, the intent of the owner to dedicate may be evidence *by his express act in filing a plat or map of his property without regard to whether it is sufficient as a statutory plat,* where it shows thereon certain places designated as streets, alleys, parks etc. This is one of the clearest ways of declaring an intention to dedicate. (Emphasis supplied).
>
> Third, if the owner plats his property and then sells lots pursuant to the plat...
>
> Fourth, the intent to dedicate may be shown by recitals in a deed in which the rights of the public are recognized.
>
> Fifth, the intention of the owner to dedicate may be shown by his oral declarations . . .
>
> Sixth, *the intent may be shown by affirmative acts of the owner in connection with property, as by fencing a way, or like conduct.* (emphasis supplied)

> Seventh, it is generally held that the intent may be shown by the acquiescence of the ownr in the owner in the use of his property by the public."

There is in addition to the above, an equitable doctrine of dedication under the theory of Estoppel. McQuillin at section 33.63, beginning with page 802, states:

> "One claimed to have dedicated land to the public may be estopped by his acts and conduct to deny the dedication, and this applies as well to a corporation, as to individuals, and binds not only the dedicator but his successors in interest."

The McQuillin text quotes the case of *Premium Oil Company vs. Cedar City,* 112 Utah 324, 187 P. 2 (d) 199, as adopting the doctrine of equitable estoppel to deny a dedication. That doctrine discussed at length in the case of *Schettler vs. Lynch,* 23 Utah 305, 64 P. 955, in these words:

> "1. A dedication of land for a public highway may be either express-as where the owner manifests his purpose by a grant, evidenced by a writing-or implied, where the acts and conduct of the owner clearly manifests the intention on his part to devote the land to the public use; but in either case it is always a question of intention, and no particular formality or form of words is necessary.

2. An implied dedication is founded on the doctrine of equitable Estoppel, and when land has been thus set apart as a highway for the use, convenience, and accommodation of the public and enjoyed as such, the law considers it in the nature of an estoppel in pais, which precludes the original owner from revoking such dedication.

3. An implied dedication of land as a highway is not within the Statute of Frauds, and may be established by parole or in any conceivable way by which the intent of the owner can be made apparent.

4. Where land has been set apart by the owner for the public use as a highway and accepted by the public, *the right of the public does not depend upon a ten or twenty year user or possession;* the dedication may be inferred from long continued use by the public with the knowledge of the owner, and without objection by him.

5. Where the evidence shows such a course of conduct and such acts respecting the land in controversy as clearly manifest an intention on the part of the owner to appropriate it to the public use as a highway, and such as were

> calculated to induce people to believe that the land was devoted to such purpose, and lull them into security as to any rights they might acquire with reference thereto, the law will imply a dedication." (emphasis supplied.)

The *Schettler* case is very similar to the case now before the Court in that there was in existence and use a very narrow road prior to the commercial development of the property. In the *Schettler* case the property owner included a twelve foot strip of his property within the street by building a board fence.

It is submitted that the installation of curb and gutter is much more of a permanent improvement than a wooden fence as was found sufficient in the Schettler case to imply a dedication.

The only objection or reservation so far as the continual public use of the property in the instant case is concerned, if it existed at all, existed only in the mind of Mr. Frank Earl, President of the Respondent Corporation.

He voluntarily set back to a predetermined street line in three separate instances and obtained building permits consistent therewith, (see Trial transcript page 113). His acts as early as 1959, despite statement to the contrary, indicat-

ed a definite intention to dedicate the additional street width to the public.

It was not until years later in 1968, when this case was filed, that he expressed an intent to deny the City the right to use the Northern twelve feet of his property for street purposes. The first time he brought any objection to the use was when the City Commissioner and City Engineer requested an additional one foot across the frontage of his property so as to make room for a sidewalk.

This coupled with the provision above quoted from the lease which Mr. Earl negotiated on behalf of his corporation with Standard Oil of California could be interpreted in no other way than an intent to dedicate. The only reservation he had was that he intended at sometime to get money from the City but this was never disclosed or discussed until years later.

The Court below, sitting without a jury erred in refusing to take into consideration these acts of the property owner and construing them to be a dedication; this being an action in equity, it is appropriate to have the same facts considered by the Court on appeal, as stated in McQuillin, Section 33.41 beginning at page 730.

"If the evidence is conflicting the ques-

> tion is one of fact for the consideration of the jury, but if the facts are undisputed the question is one of law for the Court as previously noticed, the construction of a plat is generally one of law for the Court."

In each instance that the property owner applied for a building permit he submitted a plat for approval to the City as a condition for obtaining a permit and each of the plats showed a set back to the wider width street line demanded by the City and in fact was an acquiesence to the City's need for a wider street in order to service the property of the Respondent.

All of the facts before the Court indicate that there was an acceptance of the dedication and that the City has, as far back as 1958 treated the full 100 foot width street as having been dedicated to the City and accepted by the City and was in fact improved by the City with full width hardsurfacing, curb, gutter and sidewalk. In all regards the property was treated exactly the same as the neighboring property.

POINT III

WHEN A CITY WIDENS A STREET BY OCCUPYING PRIVATE PROPERTY, IS THE CITY ENTITLED TO OFFSET AGAINST THE VALUE OF THE

PROPERTY TAKEN, SPECIAL BENEFITS CONFERRED ON THE BALANCE OF THE PROPERTY?

The Court below in its supplement memorandum decision (R-21) found that as a matter of *law* no consideration could be given to the Appellant herein for special benefits, since in the opinion of the Court, special benefits are deductible only against severance damages and not for land values found and determined by the Court.

The Court in making its determination depended on Section 78-34-10, UCA, 1953 as amended, and refused to allow a set-off for an acknowledged improvement of the property because of the reading of that statute.

The Court made a basic error in relying upon the Eminent Domain statute of Utah, in making this determination. This is not an action under statute but is an action in equity and the position of the Court below ignores the rather basic distinction between an action pursuant to a statute and an action in equity.

Respondent herein has asked the Court to grant compensation for a taking of property by the Municipality, but denies the Municipality any right for off-set for benefits conveyed and capitalized on by the Respondent in developing its property. The determination of this question

is not one of statutory construction, but is one of determining whether it is fair to have the Respondent compensated in the amount of $17,-350.37 for a piece of property 13 feet wide and 271 feet long and yet ignore an uncontested increase of value to the remaining property which has a much larger area and according to the only evidence before the Court given by Appraisers Tug Jacobsen and Ward Heal, the entire remaining property was benefited to the extent of fifteen percent increase in value. It is also pointed out to the Court that the judgment entered by the lower court found that there was a taking as of January 1, 1969, which purportedly was the date of the taking, the evidence fails to show any plausible connection between that particular date and any act of the City which could be construed to amount to a taking.

The only logical date for determining a taking by the City would have to be the date when the first building permit was requested and the City required that the property owner setback, that date goes clear back to 1959. If the actions of the City constituted an equitable taking of property in the year 1959, then this action was not timely brought, but is barred by the provisions of 78-12-6, UCA, 1953 as amended, which

section requires that any action founded upon the title to real property, must be commenced within seven years from the time of the committing of the act. It is submitted to the Honorable Court as an item of equity to be determined here, that the date selected by the Court as the purported date of taking was arbitrary and has no basis in fact, upon the record, but was an arbitrary date seized upon for the purpose of avoiding the statute of limitations. It is noteworthy that the complaint on file does not allege *any* specific date when the purported "taking" occurred and it is submitted that the reason that this fundamental date is lacking from the complaint is the awareness of Respondent that the action in equity was not timely brought.

Very likely this type of claim is subject to the provisions of 63-30-6, UCA, 1953 as amended, which waives immunity for suit against a governmental entity for an adverse claim, if so, then the suit is probably also barred by 63-30-15 which requires that the suit be commenced within one year after expiration of the notice requirements. One seeking equity must also observe the amenities of the law and is bound by the same statutory requirements of notice and timely filing.

CONCLUSION

The Court below has erred in granting an inequitable judgment to the Respondent, compensating the Respondent without giving any off-set for benefits which he admittedly has received.

This being an action in equity both the facts and the law are before the Appellate Court for review. The position of Appellant is that the public have been mislead by the acquiescence of the Respondent over a period commencing in 1959 up until the time of the commencement of this action in 1968, into thinking that his acquiescence in observing a wide street width in conformity with the Street Plan adopted by the City and observed by all of the neighboring properties, had in fact, established a 100 foot wide road right-of-way.

Voluntary compliance by the Respondent in building a number of buildings and establishing curb and gutter, so that the public would see and use a well defined and fully developed street in front of Respondent's property, was in the view of the Appellant a full and complete dedication, the acts of the Respondents having shown his intent over a period of years.

It was only after the street was fully developed and the Respondent's property was fully

developed, taking full advantage and benefit of the public improvements, that Respondent made demand for compensation for the property to which he owns legal title, but which in fact had been dedicated to the public use for street purposes for a period in excess of 9 years.

Public policy, equity and good judgment cry out at the over-legalistic manipulations of the Respondent herein in demanding full compensation for all of the property involved without any off-setting credit to the public for the benefits so richly enjoyed by the property owner.

RESPECTFULLY SUBMITTED this 21 day of March, 1972.

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