1974

James E. Good And Mary G. Good v. Don M. Christensen, Don M. Christensen Construction Co. : Brief of Respondents

IN THE SUPREME COURT OF THE STATE OF UTAH

JAMES E. GOOD and MARY G. GOOD,
Plaintiffs and Appellants,

vs.

DON M. CHRISTENSEN, DON M. CHRISTENSEN CONSTRUCTION CO., CONSTRUCTION REALTY, LEWIS C. HANSEN and BILLIE J. HANSEN,
Defendants and Respondents.

Case No. 13659

BRIEF OF RESPONDENTS

An Appeal from the Judgment of the Third Judicial District Court in and for Salt Lake County, State of Utah, before the Honorable G. Hal Taylor, Judge

Dean E. Conder
NIELSEN, CONDER, HANSEN AND HENRIOD
410 Newhouse Building
Salt Lake City, Utah 84111
Attorneys for Defendants-Respondents Don M. Christensen, Don M. Christensen Construction Co., and Construction Realty

Guy Burningham
GUSTIN & GUSTIN
1610 Walker Bank Building
Salt Lake City, Utah 84111
Attorneys for Defendants-Respondents Lewis C. Hansen and Billie J. Hansen

Tim Dalton Dunn
HANSON, WADSWORTH & RUSSON
702 Kearns Building
Salt Lake City, Utah 84101
Attorneys for Plaintiffs and Appellants

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MISCELLANEOUS

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STATEMENT OF THE CASE

Plaintiffs-Appellants brought suit in the District Court for Salt Lake County alleging the negligent design and construction of a multi-car carport which plaintiffs alleged had been designed and constructed by Defendants Don M. Christensen, Don M. Christensen Construction Company, and Construction Realty, which was originally built for Defendants Lewis C. Hansen and Billie J. Hansen, more than seven years previously.

DISPOSITION IN LOWER COURT

Defendants-Respondents moved for Summary Judgment alleging that the seven-year statute of limitations set forth in Section 78-12-25.5 of the Utah Code Annotated

(1973 Supp.) and the four-year statute of limitations set forth in Section 78-12-25(2) of the Utah Code Annotated (1973 Supp.) barred Plaintiffs-Appellants' action, and the Lower Court granted Defendants-Respondents' motions.

RELIEF SOUGHT ON APPEAL

Defendants-Respondents seek denial of Plaintiffs' appeal and affirmance of the Order entered by the Lower Court.

STATEMENT OF THE FACTS

Plaintiffs alleged that Defendants Don M. Christensen, Don M. Christensen Construction Company and Construction Realty (hereinafter "Christensen") designed and constructed a multi-car carport in 1965. Defendants Lewis C. Hansen and Billie J. Hansen (hereinafter "Hansen") were the parties in actual possession and control as owners at the time the carport was designed and constructed. In 1969, Plaintiffs James E. Good and Mary G. Good acquired an ownership interest in the carport. On January 1, 1973, subsequent to a heavy snowfall, which caused extensive damage throughout the area, the carport collapsed. This action was not commenced until more than seven years after the construction of the carport.

ARGUMENT

POINT I

PLAINTIFFS-APPELLANTS ARE BARRED FROM BRINGING THIS ACTION BY SECTION 78-12-25.5 OF THE UTAH CODE ANNOTATED (1973 SUPP.).

Section 78-12-25.5 of the Utah Code Annotated (1973 Supp.) is specifically intended to cover the situation in the instant case. The statute reads as follows:

> "INJURY DUE TO DEFECTIVE DESIGN OR CONSTRUCTION OF IMPROVEMENT TO REAL PROPERTY — WITHIN SEVEN YEARS. — *No action to recover damages for any injury to property, real or personal,* or for any injury to the person, or for bodily injury or wrongful death, *arising out of the defective and unsafe condition of an improvement to real property, nor any action for damages sustained on account of such injury, shall be brought against any person performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property more than seven years after the completion of construction.*
>
> "(1) 'Person' shall mean an individual, corporation, partnership, or any other legal entity.
>
> (2) Completion of construction for the purposes of this act shall mean the date of issuance of a certificate of substantial completion by the owner, architect, engineer or other agents, or the date of the owner's use or possession of the improvement on real property.
>
> "The limitation imposed by this provision shall not apply to any person in actual possession and control as owner, tenant or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury for which it is proposed to bring an action.
>
> "This provision shall not be construed as extending or limiting the periods otherwise prescribed by the laws of this state for the bringing of any action." (Utah Code Annotated, Section 78-12-25.5 (1973 Supp.) (Emphasis added)

The preamble to this Act was adopted by the Legislature and explains the statute as follows:

> "An Act Enacting a New Section 78-12-25.5 Utah Code Annotated 1953, Relating to the Limitations of Actions by Providing a Time Limit in Which Actions for Injury to Property or Death Must Be Brought Against Persons Who Performed or Furnished the Design, Planning, Supervision or Construction of Improvements on Real Property." (Laws of Utah, 1967, Chapter 218)

Section 78-12-25.5 is an expression of the legislative policy decision that there should not be indefinite liability in cases such as the instant one. This determination is within the discretion of the Legislature. It determines that if no cause of action arises within seven years from the date of construction of an improvement to real property that the expiration of that time period is prima facie evidence that there was no faulty construction. This determination is to give effect to the legislative policy decision to bar litigation arising out of actions which occurred a longer time prior to the institution of the litigation than the number of years of the applicable statute of limitations. Similar statutes are applicable in all areas of the law. The legislative intent in enacting this statute was to avoid spurious claims, to put a limit on the amount of time in which a party can rely on construction defects without taking into consideration the necessary subsequent maintenance of such property, and to avoid the obvious problems regarding the admission of evidence years after the activity in question.

The Supreme Court said in the case of *Price v. Tuttle*, 70 Utah 156, 258 Pac. 1016 (1927):

> "(1) In the construction of statutes it is the duty of courts to ascertain the intent of the legislative body and, if the legislation is within the constitutional power of the Legislature, to enforce that intent. In determining the intent of legislation not only the language of the act may be considered, but the purposes or objects sought by the Legislature should be and are considered by the courts in determining the legislative intent."

A case closely analogous to the instant case is *Joseph v. Burns*, 260 Ore. 493, 491 P.2d 203, (1971). In this case, the owners and others brought an action against the architects and engineers for damages resulting from a collapsed roof. The Oregon limitations law provided that no action could be brought more than ten years after the "act or omission complained of." The Oregon Supreme Court held that the ten-year statute of limitations applied ". . . . from the date of the act or omission regardless of when the damage resulted or when the act or omission was discovered."

The Washington Supreme Court reached a similar decision in the case of *Yakima Fruit & Cold Storage Co. v. Central Heat & P. Co.*, 81 Wash. 2d 528, 503 P.2d 108, (1972). In that decision, the Court discussed a similar Washington statute involving actions arising out of defects in improvements to real property. The Court held that real property improvement, namely, the re-installation of pipes, coils, hangers, and rods that replaced those which had been a part of the cold storage warehouse building for forty years, was completed in 1961, but where the suit against the contractor was not instituted until after a portion of that cold storage system and equipment had

collapsed in 1968, the suit was barred by the statute of limitations because the cause of action did not accrue within six years of the date of the completion of the work by the contractor. The Court in Yakima pointed out that since 1961 more than twenty states have enacted similar statutes to actions arising out of defects in improvements to real property. The Court also pointed out that in the case of ***Skinner v. Anderson***, 38 Ill. 2d 455, 231 N.E. 588, (1967) (also cited by Plaintiffs) the Illinois Court declared the Illinois statute unconstitutional as being special legislation in favor of only architects and contractors. The Washington Court distinguished the statute cited in the ***Yakima*** case from the statute in the ***Skinner*** case because the scope of the Washington statute is not limited as to vocation. The Utah statute is also ***not limited*** as to vocation. The Utah statute bars actions against any person performing or furnishing the design, planning, supervision of construction, or construction of an improvement to real property.

In the case of ***Salesian Society v. Formigli Corporation***, 120 N.J. Super. 493, 295 A.2d 19, (1972), in a suit by a building owner more than thirteen years after construction against a contractor and sub-contractor where the applicable statute limited the time period for bringing such action to ten years, the New Jersey Supreme Court held that this statute was not a statute of limitations but rather "the statute prevents from ever arising a cause of action against members of the protected class at a given point in time."

By looking at the preamble and the body of the statute together, we see that the obvious intent of the Legislature was to place a seven-year statute of limitations on the claims for anyone suffering injury or death by a person who built, designed, planned, or supervised construction or improvement on real property. This statute applies specifically to the conduct here in question. This, as a specific statute versus the broad statute of any ". . . action for relief not otherwise provided for by law," should take precedence over that broader statute where the action comes within its provisions. Plaintiffs' argument that this statute does not apply refers only to the fourth paragraph. In that paragraph, by limiting this statute with respect to owners and persons in actual possession or control of the property, the Legislature is saying that the person who is in possession or control at the time of the creation of the "defective and unsafe condition" does not come within these provisions. This is an exception made by the Legislature based on the policy that the owner at the time of the construction and the creation of the "defective and unsafe condition" should be exempt from this seven-year statute of limitations. The persons in actual possession and control at the time of construction and completion of construction were not Plaintiffs Good. Defendants Hansen had possession at the time of construction. Thus, if there was any defective and unsafe condition created, it was created during the possession and ownership of Hansens.

In the case of *Salesian Society vs. Formigli Corporation*, supra, the New Jersey Court was required to interpret a clause in the New Jersey statute which is identical

to the clause brought into question by the Plaintiff in the instant case. After a lengthy discussion within which the Court referred to *Comment, "Limitation of Actions Statutes for Architects and Builders — Blueprints for Nonaction,"* 18 Catholic U. L. Rev. 361, (1969), and *Hearing No. 7 on H.R. 6527, H.R. 6678, and H.R. 11544 before Subcommittee No. 1 of the House Committee on the District of Columbia,* 90th Cong., 1st Sess. 5, 11, 24, 29, (1967), the Court then went on to hold that "the legislative intent was to insulate contractors, architects, planners and designers from all claims, whether in tort or in contract . . . ." What the Legislature intended to preserve was the right to make a claim against a person "in actual possession or control as owner, tenant or otherwise," at the time of the creation of the defective condition.

The effect of this clause in this statute is that potential liability for dangerous conditions is left on the owner or other person in possession if an injury is caused by circumstances giving rise to a cause of action. The Legislature meant to exclude from liability persons (such as Defendants herein) who have been long out of possession and without the right or duty to make inspections and repairs for conditions that may be discovered within the seven-year time period.

Since the Plaintiffs were not in possession, they were cut off by the preceding parts of this statute. Any other construction would lead to an almost total obliteration of the statute. It would mean that only trespassers or strangers would have the law extended from the four-year statute of limitations to a seven-year statute. It is the function

of the courts to give legal effect to the intent of the Legislature, not to thwart the obvious legislative intent. (See 50 Am. Jur., *Statutes,* Section 227; *Parkinson v. State Bank,* 84 Utah 278, 35 P.2d 814, (1934), 94 ALR 112; *A. Booth & Co. v. Weigand,* 30 Utah 135, 83 Pac. 734, (1906); *Rospigliosi v. Glenallen Mining Co.,* 69 Utah 41, 452 Pac. 276, (1926); *Price v. Tuttle, supra.*

A statute identical to the Utah statute was upheld in New Jersey in the case of *Rosenberg v. North Bergen Tp.,* 61 N.J. 190, 293 A.2d 662, (1972), in which the Court held:

> "The injured party has literally no cause of action. The harm that has been done is damnum absque injuria — a wrong for which the law affords no redress. The function of the statute is thus rather to define substantive rights rather than to alter or modify a remedy. A legislature is entirely at liberty to enact new laws or abolish old ones as long as no vested right is disturbed."

In that case that statute was attacked on exactly the same grounds as Plaintiff is attacking this statute in the instant case. That statute was upheld and Plaintiff was denied his right of action in that statute.

Plaintiff relies on *Deschamps v. Camp Dresser & McKee, Inc.,* (N. Hamp.) 306 A.2d 771, (1973). That is the only case Defendants have found supporting Plaintiffs, and since it does not give sufficient facts to determine whether or not it is distinguishable from the instant case and no authority or reasoning is therein cited to support that Court's decision, Defendants find that case less than persuasive.

The Legislature intended that this statute govern this particular type of action and therefore the Court should affirm the Lower Court's decision that this statute does govern the instant case.

POINT II

EVEN IF THIS COURT SHOULD DECIDE THAT THE PLAINTIFFS' ACTION IS NOT BARRED IN THE PROVISIONS OF 78-12-25.5, THE FOUR-YEAR STATUTE OF LIMITATIONS AT SECTION 78-12-25 (2) IS AN EFFECTIVE BAR TO PLAINTIFFS' COMPLAINT

Plaintiffs allege that Section 78-12-25 (2) which provides for a four-year statute of limitations is applicable and that the four-year period runs from the time of the discovery of the alleged defect or when with reasonable diligence the alleged defect should have been discovered. Plaintiffs allege that the carport in question was unlawfully designed and constructed because it failed to comply with local building code requirements. In the Plaintiffs' answer to Interrogatory No. 6, specific items are alleged to have been structurally inadequate. Since Plaintiffs' cause of action is based upon structural defects, those defects should have been obvious to Plaintiffs at the time they took possession of the property. The construction work complained of was open and obvious to anyone looking at it. There was no concealment or hidden defect. Anyone in possession knew or should have known of its defective condition at that time. Therefore, the cause of action accrued at the time of completion of that construction. In the case of *State Tax Commission v. Span-*

ish Fork, 99 Utah 177, 100 P.2d 575, (1940), cited at page 14 of Plaintiffs' brief, the Court stated as follows:

> "The question is then, when did the cause of action accrue? The general rule is that it accrues at the time it becomes remediable in the courts, that is when the claim is in such condition that the courts can receive and give judgment if the claim is established."

Assuming arguendo that the carport had been negligently constructed and unlawfully designed as alleged by Plaintiffs, in that case, the alleged defects would have been discoverable and therefore remediable at the time of completion of the construction and the cause of action would have accrued at that time.

In *Poole v. Terminix,* 200 F.2d 746 (D.C. Cir. 1952), Plaintiff had sought damages for breach of an implied warranty by the Defendant to do a workmanlike job in insulating Plaintiff's house against termites. In that case, Plaintiff charged that in the course of the work the Defendant drilled holes in the cement floor of Plaintiff's basement and then filled these holes with cement. Plaintiff alleged that the drilling damaged some tile drain beneath the floor, resulting in dampness in the basement, but the alleged injury was not discovered until some time later when leakage made the dampness visible. Defendant raised the three-year statute of limitations as a defense. The suit had been filed more than three years after the work was done but within three years from the time when the alleged injury was discovered. Plaintiff contended that the statute did not begin to run until such discovery or by the exercise of ordinary diligence he would have

discovered the breach. The Court held that for the statute of limitations to begin at any time other than when a cause of action arose that situation must be limited to one with discovery prevented by fraud. The Court stated:

> "No contention is made in the present case upon the basis of fraud, either actual or constructive. Accordingly the general rule that limitations begin to run from the time of breach, *Zellan v. Cole,* 1950, 87 U.S. App. D.C. 9, 183 F.2d 139, applies. This conforms with the purpose of statutes of limitation to bring repose and to bar efforts to enforce stale claims as to which evidence might be lost or destroyed. See *Bailey v. Glover,* 1874, 21 Wall. 342, 88 U.S. 342, 22 L.Ed. 636. In some cases no doubt this rule leads to hardship, but the rule for which plaintiff contends often would have like consequences. We must give effect to the policy which bars litigation due to contract breaches which occurred a longer time prior to the institution of the litigation than the number of years of the applicable statute of limitations. Even in the criminal law, absent specific provision to the contrary, a statute of limitations begins to run from the time of commission rather than of exposure of the alleged offense. See *Synnott v. State,* 1927, 38 Okl. Cr. 281, 260 P. 517."

It would appear that even if the limitation imposed by this provision does not apply to the Plaintiffs in this case, thus bringing the four-year statute into play, the terms and definitions with regard to actions of this kind for injuries caused by defective design or construction of improvement to real property are the statements of intention of the Legislature and would therefore still be applicable. Thus, even if Plaintiff wishes to remove himself from the seven-year limitation, he cannot change the

circumstances under which he brings this action nor remove himself from the Legislature's determination of when the cause of action would accrue; namely, the completion of construction as defined in Section 78-12-25.5(2) which would be controlling under Section 78-12-1 of the Utah Code Annotated, 1953.

Appellants' actions are barred by Section 78-12-25(2) of the Utah Code Annotated, 1953.

POINT III

SECTION 78-12-25.5 OF THE UTAH CODE ANNOTATED IS A VALID AND CONSTITUTIONAL EXPRESSION OF THE LEGISLATIVE POLICY DECISION THAT THERE SHOULD NOT BE LIABILITY FOR AN INDEFINITE PERIOD IN A CASE OF ALLEGED DEFECTIVE CONSTRUCTION.

Such a determination is within the discretion of the Legislature. It has been determined, in the case of this statute, that if no cause of action arises within seven years of the date of construction then that is prima facie evidence that there was no faulty construction.

Plaintiff asserts that this statute violates the Constitution because it may extinguish a cause of action before that cause of action arises.

This is not a violation of due process or equal protection. The Constitution does not guarantee a right to sue but only a right to due process and equal protection. This statute does not violate those standards because it is not discriminatory. It applies evenly to all injuries

which fall within its area of coverage. People who have such injuries are not in any suspect classification, and they are therefore not deprived of due process or equal protection.

Plaintiff relies upon *Brown v. Wightman*, 47 Utah 31, 151 Pac. 366, (1915), to show that 78-12-25.5 is unconstitutional. *Brown* does not support Plaintiff's position but, rather, recognizes the legislative right to place limitations on the right to be heard in court. It specifically states that where the statute does not give a remedy the Constitution does not require one.

> "The right and power as well as the duty, of creating rights and to provide remedies, lies with the legislature and not with the courts. The courts can only protect existing rights, and they may do that only in accordance with established and known remedies."

In many cases our statutes not only extinguish a cause of action before the cause of action arises but they also completely cut off the cause of action. For example, Workman's Compensation cases under Section 35-1-60 cut off all civil liability of employers to employees under the Workman's Compensation Statutes. See *Masich v. United States Smelting, Refining & Mining Co., et al.*, 113 Utah 101, 191 P.2d 612, (1948), where the Utah Supreme Court held that the employee's right to sue was entirely abrogated by the statutory provisions.

Defendants urge the Court to take note of the United States Supreme Court decision, *Morey v. Doud*, 354 U.S. 451, 1 L.Ed. 2d 1485, 77 Sup. Ct. 1344, (1957), where

Justices Frankfurter and Harlan, in dissent, caution against the invalidation of legislation in the absence of extreme circumstances. They state:

> "Invalidating legislation is serious business and it ought not to be indulged in. . . . In applying the Equal Protection Clause, we must be fastidiously careful to observe the admonition of Mr. Justice Brandeis, Mr. Justice Stone, and Mr. Justice Cardozo that we do not sit as a super legislature. *Colgate v. Harvey*, 296 U.S. 404, 80 L.Ed. 299, 317, 56 S.Ct. 252, 102 ALR 54 (1935)."

This statute is a valid exercise of legislative discretion within the constitutional limitations upon the legislative powers. It is not unconstitutional.

The Utah Supreme Court has often held that the legislative body has great discretion in fixing limits on classification and also that it is not within the judiciary's province to question the Legislature's wisdom or motives in enactment of a statute. See: *Davis v. Ogden City*, 117 Utah 315, 215 P.2d 616, (1950), 16 ALR 2d 1208, rehearing denied, 118 Utah 401, 223 P.2d 412; *Slater v. Salt Lake City*, 115 Utah 476, 206 P.2d 153, (1949); *Thomas v. Daughters of Utah Pioneers*, 114 Utah 108, 197 P.2d 477, (1948), appeal denied 69 S. Ct. 739, 336 U.S. 950, 93 L.Ed. 1090; *Rowley v. Public Service Commission*, 112 Utah 116, 185 P.2d 514, (1947); *Bateman v. Board of Examiners of State of Utah*, 7 Utah 2d 221, 322 P.2d 381, (1958); *Broadbent v. Gibson*, 105 Utah 53, 140 P.2d 939, (1943); *Rules of Civil Procedure*, Rule 56, UCA 1953, 10-3-1; and *Bradshaw v. Beaver City*, 27 Utah 2d 135, 493 P.2d 643, (1972).

POINT IV

PLAINTIFFS ARE BARRED FROM BRINGING THIS ACTION BECAUSE IN FAILING TO ALLEGE A DUTY OWED BY DEFENDANTS TO PLAINTIFFS THEY HAVE FAILED TO STATE A CLAIM FOR WHICH RELIEF MAY BE GRANTED.

In the pleadings now before this Court, Plaintiffs have not made any allegation of any duty, contractual, statutory or otherwise owed by Christensen and Hansen to Plaintiffs Good. In the case of *Industrial Commission of Utah v. Wasatch Grading Co.*, 14 P.2d 988, 80 Utah 223, (1932), the Court held that the complaint was insufficient because it failed to disclose the essentials of the alleged duty between the parties therein. In the instant case, Plaintiffs have failed to allege a duty owed by Defendants to Plaintiffs and therefore they are barred from bringing this action.

CONCLUSION

Plaintiffs are barred from bringing this action against Defendants.

Respectfully submitted,

Dean E. Conder
NIELSEN, CONDER, HANSEN AND HENRIOD
Attorneys for Defendants-Respondents Don M. Christensen, Don M. Christensen Construction Co., and Construction Realty
410 Newhouse Building
Salt Lake City, Utah 84111

Guy Burningham
GUSTIN & GUSTIN
Attorneys for Defendants-Respondents Lewis C. Hansen and Billie J. Hansen
1610 Walker Bank Building
Salt Lake City, Utah 84111

MAILING CERTIFICATE

I hereby certify that this Brief of Respondents was served by mailing two (2) copies thereof, postage prepaid, to Tim Dalton Dunn, Attorney for Plaintiffs-Appellants, 702 Kearns Building, Salt Lake City, Utah 84101 this

..... day of July, 1974.

Dean E. Conder